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[fol. A] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 63CR 36(1)

UNITED STATES OF AMERICA, Plaintiff,

v.

MICHAEL C. SANSONE, Defendant.

INDICTMENT—Filed January 30, 1963

The Grand Jury charges:

That on or about the 16th day of April, 1957, in the Eastern Division of the Eastern District of Missouri,

Michael C. Sansone,

who during the calendar year 1956 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis District, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $1,500.78 and that the amount of tax due and owing thereon was the sum of $320.95, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $6,513.37, upon which said taxable income there was owing to the United States of America an income tax of $1,373.73.

In violation of Section 7201, Title 26, United States Code.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 365

MICHAEL C. SANSONE, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. B] —Second Count—

The Grand Jury further charges:

That on or about the 14th day of April, 1958, in the Eastern Division of the Eastern District of Missouri, Michael C. Sansone, who during the calendar year 1957 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957, by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis District, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $2,963.94 and that the amount of tax due and owing thereon was the sum of $648.81, whereas, as he then and there well knew, their joint taxable in for the said calendar year was the sum of $13,108.83, upon which said taxable income there was owing to the United States of America an income tax of $3,105.29.

In violation of Section 7201, Title 26, United States Code.

A True Bill.

Mike L. Hazard, Foreman.

Richard D. FitzGibbon, United States Attorney.

[fol. C] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

E. DIVISION

[Title omitted]

PRAECIPE FOR WARRANT—Filed January 30, 1963

The Clerk of said Court will issue warrant, an indictment (information or indictment) against the above-named defendant having been filed in the above-entitled cause on 30th day of January, 1963.

This 30th day of January, 1963.

Frederick H. Mayer, Assistant United States Attorney.

Warrant issued: 1/31/63 ED

Bond $1,000.00

[fol. D] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

ORDER FIXING BOND—January 30, 1963

On motion of Frederick H. Mayer, Assistant United States Attorney, it is hereby ordered that the bond of the above-named defendant be fixed in the sum of $1,000.00, said bond to be taken before a United States Commissioner, and made returnable forthwith, and from day to day, term

to term, and time to time thereafter as the Court may order.

James H. Meredith, United States District Judge.

Dated this 30th day of January, 1963.

[fol. E]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Before: Hon. Roy W. Harper.

WARRANT FOR ARREST—January 31, 1963

To[1]: United States Marshal or any other authorized officer.

You are hereby commanded to arrest Michael C. Sansone and bring him forthwith before the United States District Court for the Eastern District of Missouri in the city of St. Louis, Mo. to answer to an Indictment charging him with violations of Sec 7201, T. 26 U.S.Code as shown by attached copy of Indictment.

Harold G. Pryce, Clerk. By Ellen C. Donovan, Deputy Clerk.

Dated at St. Louis, Mo. on Jan. 31, 1963

Bail fixed at $1,000.00

Return

Eastern District of Missouri ss

Received the within warrant the 31st day of January 1963 and executed the same. Arrested Michael C. Sansone on

---

[1] Insert designation of officer to whom the warrant is issued, e.g., "any United States Marshal or any other authorized officer"; or "United States Marshal for ..... District of ....."; or "any United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

[Stamp—Filed Feb. 13, 1963, 11 A.M., Harold G. Pryce, Clerk, U.S. District Court, E. Dist. of Mo., St. Louis.]

February 11, 1963. Taken before U.S. Commissioner O'Toole. Released on $1,000.00 Bond.

Olin N. Bell, U.S. Marshal, by Ferdinand A. Creely, Deputy.

[fol. F]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM FOR CLERK RE ARRAIGNMENT AND PLEA—February 11, 1963

Stanley M. Rosenblum, Rosenblum and Goldenhersh, 818 Olive, St. Louis, Mo. and Thomas R. Wadden of Washington, D. C., enter appearance as attorneys for defendant. Defendant waives formal arraignment and enters plea of not guilty to both counts of the indictment, and requests 15 days to file motions.

Stanley M. Rosenblum, Rosenblum & Goldenhersh, by Merle L. Silverstein, Attorneys for Defendant.

[File endorsement omitted]

[fol. G] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

MOTION FOR DISCOVERY AND INSPECTION—Filed February 26, 1963

Comes now the defendant in the above-captioned matter, and pursuant to Rule 16 of the Federal Rules of Criminal Procedure, moves the Court to order the attorney for the

government to permit the defendant to inspect or copy and photograph all books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process which relate to the sale, purchase, or adjustments to basis of the land sold by defendant in the taxable years 1956 and 1957, said land being located on Manchester Road in Ballwin, Missouri. For good cause of said motion defendant states that he has been advised and informed by the attorney for the government that the alleged profits from sales of said land in 1956 and 1957 comprise the sole items of omitted income for which he stands indicted; defendant further states the items sought will be material to the preparation of his defense in showing that he did not file false and fraudulent income tax returns for such years and that his request herein made is reasonable.

Thomas R. Wadden, Stanley M. Rosenblum, Attorneys for Defendant, 818 Olive Street, St. Louis 1, Missouri, GArfield 1-5356.

Notice and Oral Argument Waived.

Certificate of Service (omitted in printing).

[fol. H] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR DISCOVERY AND INSPECTION—Filed February 26, 1963

Defendant has filed the accompanying motion at this time merely for the purpose of the record and to keep the possibility open that the unlikely circumstance could occur where opposing counsel differ as to what defendant is entitled under Rule 16. For the present, the Assistant United States Attorney has stated to defendant's counsel that he would make available during the preparation of the defense

any and all documents coming fairly within the purview of Rule 16. He has already made unnecessary the filing of a motion for a bill of particulars by affording information as to the items of income allegedly omitted from defendant's returns. There is no reason to believe that there will arise any occasion before trial calling for this Court to rule defendant's right to discover and inspect; the Assistant United States Attorney prosecuting the case has been forthright and cooperative in affording defendant whatever the Rules give him. It is, therefore, respectfully suggested that the Court overrule this motion at this time without prejudice to defendant's leave to renew it; such a circumstance would arise only if there were an honest disagreement as to application of Rule 16 and this Court [fol. I] would then be called upon to resolve it. To this end, oral argument and any required notice are waived.

Thomas R. Wadden, Stanley M. Rosenblum, Attorneys for Defendant.

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 63Cr 36 (1)

UNITED STATES OF AMERICA, Plaintiff,

vs.

MICHAEL C. SANSONE, Defendant.

Transcript of Proceedings

Be It Remembered, that on Monday, July 1, 1963, at ten o'clock a.m., the above entitled cause came on regularly for trial before the Honorable Roy W. Harper, District Judge, and a jury duly impaneled.

APPEARANCES:

The Plaintiff was represented by Messrs. Frederick H. Mayer and William C. Martin, Assistant United States Attorneys, U. S. Court House & Custom House, St. Louis 1, Missouri, its attorneys.

The Defendant was represented by Mr. Thomas A. Wadden, Jr., of the Washington, D. C. Bar, and Mr. Stanley Rosenblum, 818 Olive Street, St. Louis, Missouri, his attorneys.

Whereupon, the following proceedings were had and entered of record:

[fol. 2] Whereupon, a jury panel was selected and sworn to answer questions upon voir dire.

Following said voir dire examination, a jury was duly selected and sworn to try the cause.

The Court: You gentlemen may proceed.

Mr. Wadden: May it please the court, might we have a rule on the witnesses, your Honor, with the exception of Mr. Conley, special agent, who we have agreed may stay in the court room, and also sit at counsel table?

The Court: You may.

All of the witnesses, any of you that are witnesses in this case, if you will go with the bailiff, he will show you where the witness and counsel room is, and you'll remain in there until you're called, or at least you will not be in the court room.

Are there any witnesses here?

It will be up to each of you to keep up with the rest of them, because we'll have no way of knowing.

Mr. Wadden: Yes, sir.

The Court: You may proceed.

(Whereupon, counsel for plaintiff made his opening statement to the jury as follows):

OPENING STATEMENT BY MR. MARTIN

Mr. Martin: Mr. Rosenblum, Mr. Wadden, if it please the court, ladies and gentlemen of the jury, at this time [fol. 3] counsel for the government gives you what we call the opening statement in which I will outline the evidence which the government will bring before you.

In this case we have an indictment which was brought by the grand jury and that indictment contains the charges that will be before you, the charges brought against the defendant.

Omitting the caption, the indictment reads:

"The grand jury charges:

"That on or about the 16th day of April, 1957, in the Eastern Division of the Eastern District of Missouri, Michael C. Sansone, who during the calendar year 1956 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis District, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $1,500.78 and that the amount of tax due and owing thereon was the sum of $320.95, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $6,513.37, upon which said taxable income there was owing to the United States of America an income tax of $1,373.73."

[fol. 4] Now, the second count of the indictment reads sugstantially the same, with a change in the dates and the amount.

The change in the date of the filing of the return is April 14th of 1958. The return was filed for the year of 1957.

Reading the section pertaining to the amounts:

"—wherein it was stated that their taxable income for said calendar year was the sum of $2,963.94 and that the amount of tax due and owing thereon was the sum of $648.81, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $13,108.83, upon which said taxable income there was owing to the United States of America an income tax of $3,105.29."

Those are the charges contained in the indictment, and the government's evidence will be, first of all, the returns for the two years in question, the years of 1956 and 1957, which were filed by the defendant on behalf of himself and his wife.

The returns wil be introduced into evidence and you will be given an opportunity to examine the returns and you will find that in the returns the amounts which we have alleged that the defendant reported are listed in those returns.

Our evidence will show that during the year of 1955, about the end of the year, the first week in December of 1955, the defendant procured an option to purchase a tract of land out in Ballwin, Missouri, here in St. Louis County; that that tract of land was located at the intersection of [fol. 5] Manchester Road and Birchwood. Manchester runs east and west, Birchwood is the street going north off of Manchester, and I think it begins at Manchester and runs a little north of Manchester in Ballwin.

The defendant procured the option to purchase this tract of land for the purchase price of $22,500.00. Subsequent to procuring the option to purchase, he also got an option from the D-X Sunray Oil Company, wherein they obtained from him an option to purchase one corner of the tract. This corner was located, or is located in the southeast corner of the intersection of the two streets, Birchwood and Manchester. The option price or the price that the D-X Company agreed to pay for this one lot was $20,000.00. This option was given to them about December 15th of 1955. Subsequently the deal was closed on or about March 19th of 1956, and briefly and roughly, the way the deal

was closed and the financing of the deal at the time of the closing was that the House Hunters, Inc., a corporation, was the seller of the whole complete tract to the defendant.

At the time of the closing of the deal they deposited with the escrow agent, the Title Company, a deed to the defendant and his wife, and the defendant deposited a mortgage on the property in the amount of approximately $5,000, which, however, excluded the lot that was under option to the D-X Oil Company. The D-X Oil Company then de- [fol. 6] posited the check for their purchase price, that is, the purchase price of the lot they were purchasing, so our evidence will show this situation:

That the defendant was purchasing a complete tract for the price of $22,500; that he was selling a portion of that tract for $20,000; that more or less simultaneously or through the same closing or escrow agreement there passed title from the House Hunters, the sellers, to the defendant, and the defendant passed on title to the D-X Oil Company for one lot; that at the closing of the transaction the defendant owed $5,000 to the House Hunters on the balance or on the mortgage, which he gave to them; and that after all of the closing costs and everything had been computed, the defendant had title to the portion other than the D-X lot, and he also had approximately $2,800—well, as a matter of fact, $2,891.71 due to him out of the escrow, which he was entitled to receive in cash, leaving the D-X lot free and clear of the mortgage, and the $5,000 mortgage on the balance of the property.

Our evidence will show that this transaction was closed during March of 1956, and that during the year of 1956, in March, when the defendant filed his income tax return, he failed to list that transaction and failed to mention any profit from that transaction whatsoever.

Our evidence will show that the defendant was employed and that he received income from his employment; that his wife was also employed and she received income from her [fol. 7] employment; and I think I can frankly state that there is no controversy about that income, so that the principal controversy will be only on the real estate transaction and the profits derived from that transaction.

Our evidence will show that during the following year, 1957, the defendant sold the corner right across the street from the D-X lot; that this lot was sold to the Gulf Oil Company—as a matter of fact, technically we'll be using the words "Tremarco Corporation," but Tremarco, I think it will be agreed, was the holding company, landholding company for the Gulf Oil Company—is that right, counsel?

Mr. Wadden: Yes.

Mr. Martin: So we'll probably be referring to the two sections and the two lots as the Gulf lot and the D-X lot, so as to simplify the matter instead of going into the various holding company and formal corporate names.

Our evidence will show on August 12, 1957, the defendant closed the deal wherein he sold to the Gulf Oil Company the other corner lot for the price of $27,000.

So our evidence will then be that the defendant sold two lots, the D-X lot and the Gulf Oil Company lot, and retained title to the balance of the tract which he had purchased from the House Hunters, Inc.

For the year of 1957, our evidence will show that the defendant when he filed his return for that year failed to [fol. 8] incorporate in that return the profit that he received from the sale of the Gulf lot, that is, the sale of the lot to the Gulf Oil Company.

We will bring to you evidence showing that we have computed the cost of the tract, or the tracts that were sold, the D-X lot and the Gulf Oil Company lot, on the basis of the assessed valuation of those lots at the time that the defendant purchased them; that we have taken the percentage of the cost—and may I explain it this way, maybe I can make it a little bit clear—we start with the base figure of $22,500 for the cost of the whole tract, that is what our evidence will show the cost of the whole tract was. Our evidence will show that he sold the D-X lot for $20,000.

We will attempt to, and we will show by the evidence the assessed valuation of that D-X lot, and from that we will compute the percentage of the cost that should have been allocated to that particular D-X lot, and when we finish with our evidence, and finish the computation on that basis, we'll find that for the year of 1956 the defendant should have reported and did owe a tax of $1,373.73 for the year of 1956.

We'll use the similar method of computation where we'll have evidence of the assessed valuation of the Gulf lot, and based upon the assessed valuation we will compute the percentage of the cost of the lot that Gulf bought, and referring that cost figure to the sale figure, our evidence [fol. 9] will show that during the year of 1957 the defendant owed to the government tax in the amount of $3,105.29, and it will be the government's evidence that the defendant, in failing in either one of the two years, '56 or '57, to report the real estate transactions for those years, that he was actually knowingly evading and attempting to evade tax that was due and owing to the government as of that time.

Thank you.

Mr. Wadden: May I reserve, your Honor?

The Court: Very well.

You may proceed.

Plaintiff's Case

Whereupon, plaintiff to sustain the issues in its behalf, offered testimony, oral and documentary, and made admissions as follows:

Mr. Wadden: Your Honor, we have entered into a stipulation that maybe will shorten the issues of the case. It's been signed by all counsel and we have no objection to it being read at this time, if your Honor agrees, to the jury.

The Court: Very well.

Mr. Martin: If the court please, I ask leave to file the stipulation and read it to the jury.

The Court: Very well.

Stipulation of Counsel

Mr. Martin: Omitting the formal caption of the stipulation, it reads, ladies and gentlemen:

> "Come now the parties on the above-captioned matter and stipulate to the truth and admissibility without objection of the following facts and evidence:

[fol. 10] "1. That the document now in the plaintiff's possession purporting to be the 1956 joint federal income tax return filed by defendant Michael C. Sansone and his wife Helen M. Sansone with the District Director of Internal Revenue at St. Louis, Missouri, on or about April 16, 1957 (a photostatic copy of which has been furnished defendant and may be hereinafter referred to as Government's Exhibit 'A'), is their true and exact 1956 joint federal income tax return, duly signed by them, and may be introduced and accepted into evidence as such without further identification and testimony pertaining thereto.

"2. That the document now in the plaintiff's possession purporting to be the 1957 joint federal income tax return filed by defendant Michael C. Sansone and his wife, Helen M. Sansone, with the District Director of Internal Revenue of St. Louis, Missouri, on or about April 14, 1958 (a photostatic copy of which has been furnished defendant and may be hereinafter referred to as Government's Exhibit 'B'), is their true and exact 1957 joint federal income tax return, duly signed by them, and may be introduced and accepted into evidence as such without further identification and testimony pertaining thereto.

"3. That said Michael C. Sansone and Helen M. Sansone earned and received the following items of income as reflected on said Government's Exhibit 'A':

[fol. 11] "Board of Education
St. Louis, Missouri—Helen M. Sansone $4,339.00

"Department of the Air Force
Scott Air Force Base, Illinois 947.12

"Department of the Air Force
McGuire Air Force Base, Illinois 326.20

"Net Income on Schedule C as Securities Salesman 698.09

"Profit from the sale of Securities as per Schedule D 476.28

"4. That said Michael C. Sansone and Helen M. Sansone earned and received the following items of income as reflected on said Government's Exhibit 'B':

"Board of Education St. Louis, Missouri—Helen M. Sansone	$4,760.00
"Scott Air Force Base	1,165.73
"Net Income on Schedule C as Securities Salesman	1,559.82

"5. That the map and diagram marked Government's Exhibit 'C' is a true and correct representation (except for the limitations noted thereon) of the description and location of certain land in Ballwin, Missouri, the colored portions of which collectively represent a certain tract of land (including an existing creek thereon) purchased by Michael C. Sansone and Helen M. Sansone his wife from House Hunters, Inc. on March 19, 1956, for a consideration of $22.500.00."

[fol. 12] Signed "William C. Martin and Frederick H. Mayer, Attorneys for the Plaintiff."

Also, "Thomas A. Wadden, Jr., and Stanley M. Rosenblum, Attorneys for the Defendant."

(Documents were marked for identification as Plaintiff's Exhibits A, B and C.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Martin: If the court please, the government offers into evidence Exhibits A, B and C mentioned in the evidence.

The Court: A is what?

Mr. Martin: A is the return for 1956, B is the return for 1957, and C is the map, showing the tract of land that is involved in the case.

Mr. Wadden: No objection, your Honor, to any one of the three exhibits.

The Court: Very well.

(Which said Plaintiff's Exhibits A, B and C were received in evidence.)

Mr. Martin: Your Honor, that's all the evidence the government has at this time.

The Court: During the noon hour, ladies and gentlemen of the jury, do not discuss the case among yourselves, let anyone talk to you about it or talk to anyone about it.

And let me caution you that there may be, I don't know, [fol. 13] there may be publicity concerning the trial, and should there be such, do not read anything in any newspaper, listen to any radio or television, newscast, where such is mentioned.

Announce a recess until two o'clock.

(Whereupon, court stood at recess until two o'clock p.m. of said Monday, July 1, 1963.)

Afternoon Session, Monday, July 1, 1963.

Pursuant to adjournment as aforesaid, at two o'clock p.m. of Monday, July 1, 1963, the court met present and presiding as before, and the trial continued as follows:

The Court: Call your first witness.

Mr. Martin: If the court please, at the suggestion of counsel, he suggested I take a minute to explain this exhibit to the jury.

Mr. Wadden: We have no objection, your Honor.

The Court: Very well.

Mr. Martin: Ladies and gentlemen of the jury, can everyone see this clearly (indicating)?

This is Exhibit C, showing the complete tract of land that was purchased by the defendant. That portion in color is the tract which was originally purchased. I call your attention to this red section. That is a creek that ran across the property.

The section over here that is in brown—is that brown?

[fol. 14] Mr. Wadden: I think so.

Mr. Martin: —is the tract that was sold to the D-X Oil Company. The blue section, the part colored in blue, the color, is the portion sold to the Gulf Oil Company in 1957. After those two sales, the defendant retained possession of

the portion colored in yellow with the creek running across there, the portion colored in red.

Is that sufficient explanation for you?

Mr. Wadden: Yes, sir. Thank you.

Mr. Martin: Mr. Thornton.

STEPHEN F. THORNTON, being produced, sworn and examined as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Martin:

Q. Will you state your name, please, sir?

A. Stephen F. Thornton.

Q. What is your business or occupation, Mr. Thornton?

A. I'm a real estate appraiser and broker.

Q. With what company are you associated?

A. I do work under my own name. I was formerly associated with House Hunters, Inc.

Q. Calling your attention to the year of 1956, were you associated with—strike that.

[fol. 15] Going back to 1955, sir, were you associated with House Hunters, Inc., during that time?

A. I was.

Q. Did you have occasion to meet Mr. Michael C. Sansone?

A. I did.

Q. Do you see him in the court room?

A. Yes, I do.

Q. Would you point him out to us, please?

A. The gentleman sitting there (indicating).

Mr. Martin: May the record show the witness is indicating the defendant?

The Court: It may so show.

(Documents were marked for identification as Plaintiff's Exhibits D, E and F.)

By Mr. Martin:

Q. Mr. Thornton, I'll give you an option contract that has been marked as Plaintiff's Exhibit D and ask you if you recognize that, sir?

A. I do.

Q. Does that bear your signature?

A. It does.

Q. You signed it as an officer of House Hunters, Inc.?

A. That is correct.

Q. Now, sir, that provides for an option to purchase certain property. Can you tell us where that property is lo-
[fol. 16] cated?

A. It's located on the north side of Manchester Road, at the intersection of Birchwood Drive.

Q. Now, sir, can you see this exhibit on the easel here?

A. Yes, I do.

Q. Would that be the portion that is in color?

A. Essentially so.

Q. Will you give us the date of the option?

A. I apparently signed this December 6, 1955.

Q. Who has the option to purchase?

A. Michael C. Sansone.

Q. What is the purchase price?

A. $22,000.00.

Q. Now, sir, did Mr. Sansone subsequently exercise that option?

A. He did.

Q. Here is a sale contract marked as Plaintiff's Exhibit E. Do you recognize that, sir?

A. I do.

Q. Does that bear your signature?

A. It bears my signature.

Q. Do you see any other signature on there, sir, that you recognize?

A. I see here the signature of Michael C. Sansone, Helen
[fol. 17] M. Sansone.

Q. Now, that contract calls for the sale of what property, sir?

A. The property that is colored there on the map.

Q. What is the price of the property, sir, as given in the contract?

A. $22,500.00.

Q. Now, sir, I'll call your attention to the portion of the contract referring to a deed of trust. Do you recognize that portion, sir?

A. I do.

Q. What is the amount of the deed of trust?

A. $5,000.00.

Q. Will you tell us who was given the deed of trust?

A. The deed of trust was taken in part payment for the $22,000.00.

Q. And the deed of trust would apply to what portion of the property that was being sold?

A. The portion west of Birchwood Drive.

Q. That would be all of the colored portion except the brown portion on Exhibit E, is that right, sir?

A. That's correct.

The Court: You say that's the portion, did you say west? [fol. 18] The Witness: Of Birchwood Drive, all except the brown part over there.

Mr. Martin: This is Birchwood Drive, your Honor.

The Court: Where is north and south on there?

The Witness: Up is north.

Mr. Martin: The top is north, Judge.

Can the court see it?

The Court: Yes, I can see it but someway I always had the impression that when you were facing north, east was on your right.

Mr. Martin: Were you asking the witness a question, your Honor?

The Witness: You're asking me something?

The Court: Where is east on the map?

The Witness: East is to my right, west is to my left.

The Court: How could that piece of property be west of Birchwood Drive is where you have me confused? I thought east was on the right-hand side of a map pointing north, isn't it? I'm not trying to quarrel with you, but isn't that true?

The Witness: The deed of trust applies to the larger section, and excluded—

The Court: Oh, the deed of trust is to the west, I'm sorry. I thought you were talking about the other piece. I [fol. 19] was confused. It applies to everything except the brown piece?

The Witness: Yes, sir.

The Court: Thank you.

By Mr. Martin:

Q. Mr. Thornton, here is a general warranty deed which has been marked as Plaintiff's Exhibit F. Do you recognize that deed, sir?

A. I do.

Q. Does it bear your signature?

A. It does.

Q. As an officer of House Hunters, Inc.?

A. That's correct.

Q. And that deed conveys what property, sir?

A. Essentially the property outlined there in colors.

Q. And it conveys it to what person?

A. To Michael Sansone and Helen M. Sansone.

Q. Now, sir, was this transaction closed through the Land Title Company?

A. It was.

Q. I believe your company—

A. The correct name is Land Title Insurance Company.

Q. Thank you, sir. And in the escrow, your company deposited all of these exhibits, D, E and F, with the Land Title Company, is that right, sir?

A. We deposited the sales contract, the general warranty [fol. 20] deed, and a statement, with instructions that when the escrow company was in a position to pay out in accordance with the statement, they were given authority to record the warranty deed and immediately thereafter the first lien. This is customary practice.

Q. All right, sir. And essentially those instructions were that when they received the purchase price then they were to record the deed and give you the balance, is that correct?

A. That's correct.

Q. Did you receive the balance from the Land Title Company?

A. Yes, sir.

Q. How much did you receive, sir?

A. The amount of the check was $16,848.15.

Q. Sir, did you receive back a deed of trust?

A. The deed of trust was received back, yes.

Q. What was the amount of the deed of trust that you received back?

A. $5,000.00.

Q. And that deed of trust was executed by what persons?

A. By the new owners, Michael Sansone and Helen, his wife.

Mr. Martin: If the court please, the government offers into evidence Exhibits D, E and F.

Mr. Wadden: No objection, your Honor.

[fol. 21] The Court: Very well.

(Which said Plaintiff's Exhibits D, E and F were received in evidence.)

Mr. Martin: I have no further questions of this witness.

Cross examination.

By Mr. Wadden:

Q. Mr. Thornton, these various exhibits that Mr. Martin has shown you each bear the name Michael C. Sansone?

A. Yes.

Q. Mr. Thornton, as a matter of fact, is it not common in real estate transactions to use what we call a straw and deed property to a straw corporation?

A. That's correct, yes.

Q. However, in this particular transaction the general warranty deed was directly to Michael C. Sansone and Helen M. Sansone, is that correct, sir?

A. That's correct.

Q. I wonder, could you tell me, Mr. Thornton, I notice that there's some stamps on this deed, and I wonder if you would examine the stamps and tell me what they are, sir?

A. These are Internal Revenue stamps that are put on warranty deeds at the time of conveyance of property, by federal law, I guess.

[fol. 22] Q. It's a tax, is it not?

A. Yes.

Q. Now, by examining the stamps, can you ascertain what the cost of the property was?

A. Reasonably so.

Q. I think at that time it was fifty-five cents a five hundred, was it not?

A. It is, has been for years.

Q. If the sales price was 22,500, would you look at the stamps and see whether the stamps would indicate to anyone who was examining the deed what the price of the property cost?

A. The stamps here are $24.75. This would indicate a sale at 22,500 or less.

Q. All right, sir. Mr. Thornton, I believe you testified that you took back a deed of trust after you made the sale on the entire tract. You took back a deed of trust on this part of the tract that is blue and yellow, is that not true?

A. And red.

Q. Yes, the creek. Mr. Thornton, to put this in very simple language, Mr. Sansone borrowed $5,000 on this land, is that not correct?

A. Yes.

Q. That I'm indicating in yellow, blue and red, and any money that he received in connection with this transaction, [fol. 23] which I suggest to you is $2,291.71, would have been borrowed money that he received, which was borrowed on this land, is that correct, sir?

A. I don't know where the 2,000 came in.

Q. Well, let me put it this way: Was any money he received in connection with the transaction and the deed of trust that you took back borrowed money?

A. He borrowed $5,000 to pay for the land is the only thing I know about.

Q. Mr. Thornton, to your knowledge, did Mr. Sansone do anything to conceal the transactions which you have just described?

Mr. Martin: Objection, if the court please. First of all, this witness isn't qualified to answer that.

The Court: He can answer if he knows.

A. No, he didn't do anything to conceal anything.

Mr. Wadden: I have no further questions, your Honor.

Redirect examination.

By Mr. Martin:

Q. Mr. Thornton, I think counsel asked you something about the amount of stamps that are customarily put on deeds. Now, when the sale is made, and a mortgage is taken back by the seller, do you customarily put the amount of stamps on to cover the full purchase price or do you deduct the amount of the mortgage?

[fol. 24] A. I think somebody made a boo-boo, if that's what you mean. It would have not been necessary to put that amount of stamps on there, in common practice. The stamps generally cover the cash consideration, where a seller takes back a mortgage, it is my understanding of the rule that it is not necessary to place stamps in that amount, and I cannot tell you why $24.75 worth of stamps went on there.

Q. But the amount of stamps on here would cover the amount of the purchase price recited in the contract, sale contract of 22,500?

A. That's right.

Mr. Martin: No further questions, your Honor.

Mr. Wadden: I have nothing further, your Honor.

The Court: You can stand aside.

(Witness excused.)

The Court: Call your next witness.

Mr. Martin: Mr. Hamilton.

Judge, could we approach the bench, your Honor, while the witness is being sworn?

(Whereupon, discussion was had off the record, in the presence but out of the hearing of the jury.)

[fol. 25] Robert A. Hamilton, being produced, sworn and examined as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Martin:

Q. Will you state your name, please, sir?

A. Robert A. Hamilton.

Q. What is your business or occupation, Mr. Hamilton?

A. I'm an attorney employed by the Land Title Insurance Company of St. Louis.

Q. Now, sir, you have been requested to bring some records of the Land Title Insurance Company with you to court?

A. Yes, I have.

Q. And you have brought those records that you were requested to bring, sir?

A. Yes.

Mr. Wadden: Your Honor, I would like to call to the court's attention that the stipulation we entered into covers, I think, both the testimony of the last witness and this witness, the last paragraph of the stipulation, your Honor.

I have no objection to it, but I thought that was our point in stipulating.

Mr. Martin: Your Honor, I don't think it covers all of the testimony pertaining to the resale of the property.

The Court: Well, let's proceed.

[fol. 26] (Documents were marked for identification as Plaintiff's Exhibits G to L, inclusive.)

By Mr. Martin:

Q. Mr. Hamilton, I will give you a group of exhibits which have been marked as Plaintiff's Exhibits G through L, inclusive. Will you examine those, sir?

Now, sir, are all of these exhibits, G through L, taken from the records of the Land Title Insurance Company of St. Louis?

A. Yes, they were.

Q. And they are records that are made in the regular course of business of that company?

A. Yes, they are.

Mr. Wadden: We stipulate the authenticity, your Honor.
The Court: Very well.

By Mr. Martin:

Q. I give you Exhibit G, sir. Will you tell us what that exhibit is?

A. That is the closing statement to Mr. and Mrs. Sansone covering the sale of a tract of land in Survey 34, Range 45, 4.

Q. Will you tell us what Plaintiff's Exhibit H is?

A. This is a statement dated March 21, 1956, from Land Title Insurance Company to Michael Sansone and Helen M. Sansone, his wife, showing the balance due Mr. Sansone, [fol. 27] which covered the sale and the purchase of two parcels of ground, which shows the balance due Mr. Sansone of $2,891.71.

Q. What is Exhibit I, sir?

A. Exhibit I is a closing statement dated March 19, 1956, which shows the purchase by Mr. Sansone of a tract of land and survey, Range 34—or Survey 34, Range 45, 4.

Q. Sir, I'll give you back Exhibit H, and I think in connection with this you mentioned there was a balance due Mr. and Mrs. Sansone?

A. Yes.

Q. Now, I'll give you Plaintiff's Exhibit J and ask you to identify that, sir. What is it?

A. This is a check of Land Title Insurance Company of St. Louis dated March 21, 1956, and payable to Michael Sansone and Helen M. Sansone, his wife, in the amount of $2,891.71, which is the net amount due as shown on the statement which has been marked Plaintiff's Exhibit H.

Q. Now, sir, has the check, which is Exhibit J, been endorsed?

A. Yes, it has.

Q. Will you read to us the endorsement?

A. "Michael C. Sansone, Helen M. Sansone."

Q. That's a check of the Land Title Insurance Company?

A. Yes, it is.

[fol. 28] Q. The check has been cashed?

A. Yes, it has.

Q. Will you tell us what Plaintiff's Exhibit K is, Mr. Hamilton?

A. This is a closing statement covering the sale by Mr. and Mrs. Sansone, covering a parcel of land on the northwest corner of Birchwood Drive in Manchester in St. Louis County, Missouri.

Q. Will you tell us what the sale price is?

A. The sales price is $27,000.00.

Q. What is the net amount due the sellers?

A. The net amount due the sellers is $21,660.67.

Q. Sir, I'll give you a check which is marked as Plaintiff's Exhibit L. It's dated August 12, 1957, made payable to Michael C. Sansone and Helen M. Sansone. Do you recognize that, sir?

A. Yes, I do.

Q. Whose check is that?

A. It's a check of Land Title Insurance Company of St. Louis.

Q. What is the amount of the check, sir?

A. $21,671.67.

Q. Will you read us the endorsements on the back of the check?

[fol. 29] A. "Michael C. Sansone, Helen M. Sansone."

Q. Has that check been cashed, sir?

A. Yes, it has.

Q. Mr. Hamilton, when you read the amount that was due to the purchasers, and the amount of the check, I noticed there was a slight difference in the amount of approximately $11. In other words, the check is $11 more than the amount shown in the statement. Will you explain that for us?

A. There is an addition of the sum of $11 which shows a title commission, which would be due to Mr. Sansone.

Q. Did we get the date of the check, sir?

A. The date is August 12, 1957.

OFFERS IN EVIDENCE

Mr. Martin: If the court please, the government will offer into evidence Plaintiff's Exhibits G through L.

Mr. Wadden: No objection, your Honor.
The Court: Very well.

(Which said Plaintiff's Exhibits G to L, inclusive, were received in evidence.)

Mr. Martin: We have no further questions.

Cross examination.

By Mr. Wadden:

Q. Mr. Hamilton, am I correct that the original sales price of the property colored in brown on the easel was 22,500, is that correct, of the total property?
[fol. 30] A. What is the color, please?
Q. No, I'm talking about the total transaction, Mr. Hamilton. Do you know what the total cost of that property was?
A. No, the only knowledge I have is of the three parcels that show the closing here.
Q. In connection with—

The Court: Let me get myself straight, if I may.
Let me see H.
Mr. Wadden: I believe this is H, your Honor (handing document).
The Court: I would suggest that you take a look at these exhibits from your outfit and see if you know what they are. I think what the attorney asked you, don't you think they show on there?
Mr. Wadden: I thought they did, Judge, from his testimony. I've never seen them before until just a minute ago, but I thought they did.
The Court: I never saw them until just then, but a quick look at them. I think they do.
The Witness: May I hear the question again?
The Court: Read him the question.

(Whereupon, the reporter read the question and the answer.)

[fol. 31] A. Well, the total sale price—

Q. Yes, sir.
A. —would be 22,500.
Q. All right.
A. Plus 20,000—

The Court: Now, wait a minute, Mr. Witness, so that you don't get everybody confused, including yourself, I just took one look at them. Isn't that three sales?

The Witness: Yes, it is.

The Court: Isn't one of them for the entire tract, and isn't the other two for part of the first tract? Isn't any need of getting utterly confused. If you don't know, we'll get somebody up here that can tell us.

The Witness: Yes, your Honor.

The Court: But isn't actually one of them for that entire tract, assuming that is what is described?

The Witness: Yes, sir, it appears to me it is.

The Court: And isn't the other two for part of the tract?

The Witness: Yes, your Honor, it appears that it is.

By Mr. W[illegible]dden:

Q. As I understand it, Mr. Hamilton, the total purchase price was $22,500, and am I correct that Gulf bought the brown property—I mean D-X bought the property colored in brown for $20,000, is that correct?

[fol. 32] A. That is correct.

Q. And was there a simultaneous closing where the sale, the purchase was made by Mr. Sansone, and simultaneously he deeded this property to D-X, for $20,000?

A. Both statements show that they were closed on the same date, March 19, 1956.

Q. Now, from examining those documents, are you able to tell where Mr. Sansone got the other $2,500 that was owed in the original purchase price of 22,500?

A. The statement shows that a first deed of trust was given.

Q. That was for $5,000, was it not, sir?

A. That's correct.

Q. And then part of that, or 2,500 of it, was used with the 20,000 from D-X to pay the total purchase price, is that correct?

A. That is correct. There was earnest money of $500 paid.

Q. I don't know anything about real estate, what do you mean by earnest money?

A. Well, at the time apparently that the contract was signed $500 was paid by the purchaser.

Q. I see.

A. As earnest money.

[fol. 33] Q. Now, you have a check there for $2,892.71, do you not?

A. I do.

Q. What does that check represent?

A. In one of these transactions—

Q. Let's talk about this particular transaction.

A. It shows the net amount due to Mr. Sansone as a result of these transactions, which I've just discussed.

Q. That is what was left over from the money he borrowed on the property, was it not, sir?

A. No, the statement shows that what has been marked as Plaintiff's Exhibit I was a purchase by Mr. Sansone of this property for $22,500.

Q. Yes, sir.

Q. What has been marked as Plaintiff's Exhibit G, shows a sale by Mr. Sansone of part of this property.

Q. I think I'm confusing you, Mr. Hamilton. I'm particularly interested—

Your Honor, may the record indicate that I'm now showing the witness Defendant's J, which is now in evidence?

I want to know what this check for $2,891.71 represents. It's made out to Michael C. Sansone and Helen M. Sansone.

A. It represents the amount, the net amount due to Mr. [fol. 34] and Mrs. Sansone and it is derived, as shown on Plaintiff's Exhibit H, which shows a balance due on the sale to Mr. Sansone of $19,981.36, and the balance due to close the purchase of the other property of $17,235.05, which the second figure deducted from the first left a balance of $2,746.31. Then the statement shows that there was a title charge refund of $75, a policy charge refund of $70, and a refund on filing of the deed of trust of forty cents,

and that totaled $2,891.71 as the net amount due to Mr. Sansone.

Q. And that amount that is due to him came from the $5,000 deed of first trust that he put on the remainder of the property, did it not?

A. Well, it came out of the net result of these two transactions.

Q. But it was money he was borrowing. This check represents money that was borrowed by Mr. Sansone, doesn't it, sir?

A. That is correct.

Q. Thank you, sir. Now—

The Court: So I can clear it up, because I think that you're confused and they're confused, Mr. Witness, $500 of that less expenses is money that he put up originally as escrow, isn't it?

The Witness: Yes, the earnest money—

The Court: Isn't actually what happened here that [fol. 35] he bought the property for twenty-two five?

The Witness: The purchase price was twenty-two five.

The Court: He put up $500 in escrow?

The Witness: The statement also—

The Court: When, if he closed, it left him owing 22,000?

The Witness: Yes.

The Court: They took a $5,000 deed of trust back?

The Witness: Correct, and there was—

The Court: And when they sold the other property to D-X, the money was used to pay off the balance of the purchase price, and this is the money above that, including the $500, isn't it?

The Witness: That is correct.

The Court: Or what is left of it.

Mr. Wadden: Judge, I just want to be sure there's no inference this was income to Mr. Sansone, because the government didn't make it clear to the jury that this was money that he borrowed—

The Court: Just let's supposing you let me take care of the law and don't let them draw the inference that it is or is not, all they're entitled to is to know how it happened. I mean we're going to have to get to the law on that.

Mr. Wadden: I'm sorry, your Honor.

[fol. 36] The Court: To which I think you will agree.

Mr. Wadden: Yes, sir.

The Court: What I was trying to bring out, Mr. Wadden, so we wouldn't have any misunderstanding, is that I think in your question that you're forgetting the $500.

Mr. Wadden: I think I am too, Judge. Thank you.

The Court: That's all I was trying to clear up for you. I'm not trying to get into the other.

By Mr. Wadden:

Q. Do any of the records you have before you indicate whether the revenue stamps were placed upon the deed, which Mr. Sansone executed to the Gulf people on August 12, 1957?

A. The statement which has been marked as Plaintiff's Exhibit G shows revenue stamps of $22.

Q. What does $22 worth of revenue stamps represent, sir?

A. That would be for a sale price of $20,000.

Q. 20 or 21, sir?

A. 20,000.

Q. As a matter of fact, when the Gulf property was sold by Mr. Sansone for $27,000, didn't $4,000 of that 27,000 go to pay off the mortgage he had originally placed on all the rest of the property other than D-X?

A. That I don't know, other than shown in these statements. I did not handle these transactions myself.

[fol. 37] Q. Well, you did notice, didn't you, sir, that the sales price was 27, and I think you said he received $21,861.67, was that correct?

A. The sale price as shown is 27,000, and the amount due to Mr. Sansone, our check was 21,600, and I believe it was $71.67, or $11, 10 or $11 more than shown on this statement.

Q. But you don't know of personal knowledge whether 4,000 of that 27 went to pay off that existing mortgage, is that correct?

A. No, I do not.

(Whereupon, discussion was had off the record, in the presence but out of the hearing of the jury.)

Mr. Wadden: I have no more questions.
The Court: Any more questions?
Mr. Wadden: I have no more, your Honor.

Redirect examination.

By Mr. Martin:

Q. Mr. Hamilton, I'll give you back the statement which is dated August 12, 1957, marked Plaintiff's Exhibit K, sir, and I'll call your attention to, I believe it's the second item on there. Will you tell us what that is? Will you read that item?

A. "Pay 1st deed of trust, $4,097.33."

[fol. 38] Q. Will you tell us what that means?

A. Well, it means that this much went to pay off a first deed of trust in this amount, $4,097.33.

Q. And that was on the property that was being sold, that first deed of trust was?

A. That's correct.

Q. And that is the closing statement of the sale from Michael C. Sansone and his wife to the Gulf Oil Company?

A. That is correct.

Mr. Martin: No further questions, your Honor.
The Court: Any more questions?
Mr. Wadden: Just one more, your Honor.

Recross examination.

By Mr. Wadden:

Q. Mr. Hamilton, do you know of anything Mr. Sansone did in connection with the transactions to which you have been testifying to conceal his interest in the transactions?

A. No, I do not. I have no personal knowledge of the closing other than the records that I have here. I was not present at the closing of the transaction.

Mr. Wadden: No further questions, your Honor.
Mr. Martin: No questions, your Honor.
The Court: You can stand aside.

(Witness excused.)

[fol. 39] The Court: Call your next witness.
Mr. Martin: Mr. Milosevich.

Steve Milosevich, being produced, sworn and examined as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Martin:

Q. State your name, sir.
A. Steve Milosevich.
Q. What is your business or occupation, Mr. Milosevich?
A. I operate a little delicatessen, sandwich shop.
Q. Will you tell us what colleges or universities you have attended?
A. Harris Teachers College, Washington University one semester, and St. Louis University Night School.
Q. Will you tell us what degrees, if any, you have, sir?
A. I have an associate in Commerce and Finance.
Q. What experience in accounting have you had, sir?
A. I worked as a junior accountant for about four years, I believe, with CPA firms, Boka & Eiswirth, and Oliver W. Schneider.
Q. Sir, during the course of that experience did you fill out income tax returns for various individuals?
A. Yes, I did.
[fol. 40] Q. Are you acquainted with Michael C. Sansone and Helen M. Sansone?
A. Yes, I am.
Q. Do you see Mr. Sansone in the court room, sir?
A. Yes, I do.
Q. Point him out to us, please, sir.
A. Over here (indicating).

Mr. Martin: If the court please, may the record show that the witness has indicated the defendant?

The Court: Record may so show.

By Mr. Martin:

Q. Are you in any way related to either one or both of them, sir?

A. Yes, I am.

Q. What is that relationship?

A. Well, Mrs. Sansone is my sister, and Michael is my brother-in-law.

Q. Have you ever prepared any income tax returns for Mr. and Mrs. Sansone?

A. Yes, I have.

Q. Sir, I'll give you what has been marked Plaintiff's Exhibit A, which is a 1956 income tax return of Mr. and Mrs. Michael C. Sansone and his wife, Helen M. Do you recognize that return, sir?

A. Yes, I do.

[fol. 41] Q. Do you recognize any signatures on the return?

A. Yes, I do.

Q. Does your signature appear on there?

A. Yes, sir.

Q. Did you prepare that return, sir?

A. Yes.

Q. I'll also give you the 1957 income tax return of Michael C. Sansone and Helen M. Sansone and ask if you recognize that return? It's marked as Exhibit B.

A. Yes, sir, I recognize it.

Q. I don't know if the lady sitting in the chair can hear you, sir.

A. Yes, I recognize it.

Q. Does your signature appear on that return?

A. Yes, it does.

Q. Did you prepare the return?

A. Yes, I did.

Q. Sir, I'll give back to you the 1956 return, which is Exhibit A. Will you refer to the section pertaining to Schedule D?

Will you tell us what Schedule D is? Just tell us what normally goes into Schedule D.

A. "Gains and losses from sales or exchanges of property."

Q. Do you see any gains or losses from sales or ex-
[fol. 42] changes of property scheduled there?

A. Yes, sir, $476.28.

Q. Is that a gain or loss?

A. It is a gain, should be. It isn't circled. Normally I would circle if it were a loss.

Q. That pertains to what type of transactions without giving us the details of each one?

A. It could be real estate or it could be stocks and bonds.

Q. Now, sir, have you itemized the items that went into arriving at that particular figure?

A. Yes, I have.

Q. Will you examine those items, sir?

A. They're all stocks.

Q. Do you find in there any reference to any real estate transaction?

A. No, sir.

Q. Now, sir, at the time that you prepared the 1956 income tax return, which is marked as Plaintiff's Exhibit A, did you know or have any information that Mr. and Mrs. Sansone had a real estate transaction?

A. I am not sure. I think at that time I may have been aware that there was a real estate transaction.

Q. From what information did you prepare the return which is Plaintiff's Exhibit A?

[fol. 43] A. From the information—

Mr. Wadden: Excuse me, your Honor, what year are we dealing with, '56 or '57?

The Court: '56.

Mr. Wadden: Thank you.

A. What was your question again, sir?

Mr. Martin: Will the reporter read the question, please?

(Whereupon, the reporter read the question.)

A. From work sheets presented to me by the Sansones.

Q. And on those work sheets presented to you by the Sansones, from which you prepared the 1956 return, was there any information on those work sheets about any real estate transactions that the taxpayers had during the calendar year?

A. The only—no, there was nothing mentioned about a real estate transaction other than real estate taxes that were reported.

Q. Sir, did you know that they had both purchased and sold some real estate during the calendar year of 1956 at the time you prepared the 1956 return?

A. I'm not—I'm not sure if at that time I knew or not.

Q. Sir, here is the 1957 return of Michael C. Sansone and his wife, Helen M. Sansone, marked Plaintiff's Exhibit B.

[fol. 44] Is there a Schedule D attached to that return, sir?

A. No, there isn't.

Q. From what information did you prepare that return, sir?

A. From a work sheet presented to me by the Sansones.

Q. Now, sir, those work sheets presented to you by the Sansones, was there any information on those work sheets pertaining to any real estate transactions which the taxpayers had had during the calendar year of 1957?

A. Not that I recall other than real estate taxes paid.

Q. On what piece of property was the real estate taxes paid on, sir?

A. I'm not sure, sir.

Q. At the time you prepared the 1957 tax return, did you know that during the year of 1956, Mr. and Mrs. Sansone had a real estate transaction in which they bought and sold property and also that during the year of 1957 they sold a piece of property?

A. I'm not sure if I knew at that time or not.

Q. Sir, I call your attention to the date of June 1st, 1960, and ask you whether or not you had a conversation—

Mr. Wadden: Excuse me, your Honor. I think we ought to approach the bench on this.

The Court: The jury can step out. I'll announce a [fol. 45] ten-minute recess when I am through.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

Mr. Wadden: Unless his Honor wants it in the record I don't need it on the record.

(Whereupon, discussion was had off the record.)

Mr. Mayer: For the record, I saw him and asked him what his name was, and introduced myself, and let him look at his statement, and then I had no further conversation except I took the statement back, is that correct, Mr. Milosevich?

The Witness: That's right, sir.

Mr. Wadden: Then, your Honor, obviously the statement shouldn't be used before the jury to refresh his memory when the government has already given it to him and it hasn't refreshed his memory.

The Court: Well, I think they're entitled to cross-examine him if he's seen the statement and the statement—let me see it.

Mr. Mayer: I think it's about the last paragraph.

The Court: What is it that you're wanting to show?

Mr. Mayer: That at the time of preparing either the tax return of '56 or '57 he had a discussion with the defendant pertaining to the sale of real estate.

The Court: Show me where it's in there.

[fol. 46] Mr. Mayer: (Indicating on document.)

The Court: What are you going to do about the part that states, "I cannot remember what year the discussion took place"?

Mr. Mayer: I'm not asking the questions but I believe we can establish—

(Whereupon, discussion was had off the record.)

The Court: You're going to have to lay your foundation. It's evident from what you've said here that I think since he's already seen the statement, you showed it to him before he went on, there's no use of handing him that "re-

fresh your memory," it's a question of laying your foundation to see if you're entitled to cross-examine.

Mr. Mayer: I think that's correct.

The Court: You agree with that?

Mr. Wadden: Yes, your Honor, I felt since they were going to use it, I felt it had already been shown to him, I didn't think it was proper to show it to the jury and try to refresh his memory the second time.

The Court: Off the record.

(Whereupon, discussion was had off the record.)

The Court: Announce a ten-minute recess.

(Whereupon, a short recess was taken, pursuant to which the trial continued as follows:)

[fol. 47] (Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: You may proceed.

By Mr. Martin:

Q. Mr. Milosevich, am I pronouncing that correctly?

A. Yes, sir.

Q. When did you learn that Mr. and Mrs. Sansone had some real estate transactions?

A. I don't—I don't recall exactly when it was.

Q. Was it during the year of 1956 that you learned?

A. Very vague, I really, honestly, I don't remember when it was, '56, '57, '58, I don't know when it was.

Q. How did you learn about it, sir?

A. Through conversations with them, visiting at their home.

Q. What did they tell you, either one of them, that you can recall—strike that.

What did Mr. Sansone tell you?

Mr. Wadden: Your Honor, I'm going to object to the witness answering that question unless counsel will place it within the years of this indictment, which is '56 and '57.

The Court: Be sustained.

By Mr. Martin:

Q. Was that conversation during the year of 1956?
[fol. 48] A. I don't recall, sir.
Q. Do you recall whether it was before or after you prepared the 1956 return?
A. No, I don't.
Q. Was it before or after you prepared the 1957 return?
A. I don't remember.
Q. Do you recall who was present at the time, sir?

Mr. Wadden: Your Honor, I think he's exhausted this conversation.
The Court: Be sustained. You're going to have to put it more particularly.

By Mr. Martin:

Q. Sir, this conversation that you mention, was it long about the time that the sale of the property occurred?

Mr. Wadden: Now, your Honor, I'll object to that until he establishes the witness—
The Court: Be sustained in the form asked.

By Mr. Martin:

Q. Mr. Milosevich, do you know when the sales occurred?
A. No, I don't.

Mr. Martin: If the court please may we approach the bench for an offer of proof?

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

[fol. 49] Mr. Mayer: Your Honor, it's our position at this time that since he said he had a conversation with them and made out the return for 1958 to show him the 1958 return in determining whether there was any sale of any property in the 1958 return reported.
The Court: To do what?
Mr. Mayer: Since we're trying to establish time here, your Honor, it is our position that we would show him the 1958 return which he stated he also prepared and whether

the 1958 return shows any sale of property, and it is our position that this will not show any sale of any real estate in '58, so that the only time he could have had this conversation would have been when he was preparing the '56 or '57 return.

The Court: Freddie, he could have had the conversation, any time. You never have got him to admit the conversation yet. I don't know anything about the '58 return, I don't even know what you're talking about.

Mr. Mayer: Well, your Honor, I feel we could go—to determine, to try and establish time, that we should be able to determine just what was said and what the conversation was.

The Court: There isn't a single thing in this record that is any indication about the '58 return, Mr. Mayer.

Mr. Mayer: That's right, yes, sir.

The Court: Don't be telling me all about the stuff when you don't even ask him. I'll pass on the questions when you [fol. 50] ask them, may not even object to it, I don't know what they'll do.

Mr. Mayer: But I'm going back to '56 and '57, your Honor, and ask him this conversation supposedly that he had with them, what it pertained to.

Mr. Wadden: Your Honor—

Mr. Mayer: And by establishing what it pertained to, perhaps we can establish what the time was.

The Court: Well, I don't know what you're going to ask him. You can ask whatever you want to, I'll rule on it at that time. I mean you indicate one thing and before we take the recess, I told you the only two, now you say you got the '58 return. I don't know what you got, but you were going to lay your foundation, you haven't laid your foundation yet in my opinion.

Mr. Mayer: Well, I think to try and establish a time we're going to have to find out what the conversation pertained to.

Mr. Wadden: I don't see that this has got—

The Court: I don't know what you're talking about. You've got me completely lost, you'll have to ask your question and we'll pass on them when you get to them. I don't understand you.

(Whereupon, the following proceedings were had in [fol. 51] the presence and hearing of the jury:)

Mr. Mayer: Your Honor, do you have any objection if I ask any questions?

The Court: Yes, I do. You attorneys well know that I do, it applies to only one attorney on one side, it applies to all attorneys. Bingo, that's it. You gentlemen have been around here long enough to be familiar with the rules. That's true of all of them, on the other side too. When they get ready to go, one of them will take them and that's it, I don't care who it is, but that's the way it goes.

By Mr. Martin:

Q. Mr. Milosevich, did you also prepare a return for Michael C. and Helen M. Sansone for the year 1958?

A. If I recall in the statement I said I did. I believe it was presented to me.

Q. What statement are you referring to, sir?

A. The one that I read down in the attorney's office a little while ago.

Q. Do you recall anything else about that statement?

Mr. Wadden: Well, your Honor—

The Court: Be sustained in the form asked.

By Mr. Martin:

Q. Do you recall giving a statement on June 1st, 1960, to an agent of the Internal Revenue Service by the name of John C. Conley?

Mr. Wadden: Your Honor, I don't think there's any [fol. 52] foundation been laid, as I understood your Honor, as to this type of interrogation.

The Court: Be overruled, I'll let him answer that.

A. What was that again, sir?

Mr. Martin: Will you read the question, please?

(Whereupon, the reporter read the question.)

A. Yes, I remember.

By Mr. Martin:

Q. And you have today read and received a copy of that statement?

A. That's right, I have.

(A document was marked for identification as Plaintiff's Exhibit M.)

By Mr. Martin:

Q. I will give you what has been marked as Plaintiff's Exhibit M, sir, and ask you to examine it, please, sir.

Mr. Wadden: Your Honor—

The Court: Be sustained. This witness has already told you gentlemen, and we said outside a while ago that it was admitted that he has seen the statement.

By Mr. Martin:

Q. Does the statement bear your signature, Mr. Milosevich?

A. Yes, it does.

Q. Calling your attention to the date of it, was your signature placed on there on about the date it bears?

[fol. 53] A. That's right.

Q. Mr. Milosevich, who first told you about the purchase or sale of the property?

A. I don't know who it was.

Q. Was that told to you in connection with the preparation of the income tax returns?

Mr. Wadden: Your Honor, I object again because we're going—

The Court: Be sustained in the form asked.

By Mr. Martin:

Q. Was that told to you in connection with the preparation of the income tax returns of the taxpayers, Michael C. Sansone and Helen M. Sansone, for the calendar year of 1956 and '57?

Mr. Wadden: I object as leading, your Honor.

The Court: Be overruled, I'll let him answer.
Mr. Wadden: If he knows.

A. What was that again?

The Court: Read him the question.

(Whereupon, the reporter read the question.)

A. I really don't recall.

By Mr. Martin:

Q. Mr. Milosevich, at the time of preparing the returns for 1956 and '57, was anything said to you by either of the taxpayers about the sale or purchase of the property? [fol. 54] A. I don't remember anything said about the sale of the property at the time I was preparing the returns.

Q. Sir, is your answer that you don't remember if anything was said or that nothing was said by either one of them? Which is it?

A. I don't remember. I don't remember what was said.

Q. Do you remember—

A. Or if anything was said.

Q. Do you remember if anything was said?

A. Or if anything was said, I don't remember.

Q. Sir, in your experience, if anything had been said you would have put that in the return, is that correct, sir?

A. It should have been in the return, yes.

Mr. Martin: May we approach the bench, your Honor?

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Mayer: Your Honor, on the basis of the last statement of the witness, the government would request the right to cross-examine this witness—

The Court: I gave you that right when we had the recess. No one has ever denied you that. You've had that ever since you've been talking about it since we came back.

Mr. Mayer: Do we have the right now to cross-examine him?

[fol. 55] The Court: I told you that while the jury was out.

Mr. Wadden: That's what I thought they had been doing, Judge.

The Court: Looks to me like that's what you've been doing. I don't know what you would call it if it wasn't that.

Mr. Mayer: I'm sorry, I misunderstood the Court.

The Court: I said if you haven't been doing that, I don't know what you've been doing.

Mr. Wadden: It's what you've been doing ever since we've been back in.

Mr. Mayer: All right.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

By Mr. Martin:

Q. Mr. Milosevich—

Mr. Wadden: Your Honor, if he's going to use this statement which we took up with your Honor at the bench, I think he ought to make clear what it's going to be used for. As already told your Honor, the statement was shown to the witness, the witness has testified he saw it, the only purpose would be—and it didn't refresh his memory, and the only purpose it could be used for would be impeachment.

The Court: Does the jury want to go out? I'll call you you back.

[fol. 56] (Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: What is it that you're proposing to do now, start reading from the statement?

Mr. Mayer: No, sir. Our next question would have been "Do you recall telling Mr. Sansone that the sale of this property would have to be declared on his income tax return?", and that he told him he wasn't sure how you reported it, but you should report it because you couldn't go to jail for reporting it, and, of course, as to what his an-

swer would be—but that was what the next question was going to be and not to read from the statement.

The Court: I think you ought to take that statement and put it over in the file and forget about it, because before you went out—because all you're doing is getting yourself closer and closer to mistrial—before we went out, while the jury was out and when we sent them out, I told you at that time—this man said he had seen the statement, you said that you gave it to him.

Mr. Mayer: Yes, sir.

The Court: So it couldn't be used to refresh his memory. I said to you at that time, go ahead and cross-examine him if you want to.

Mr. Mayer: I beg the court's pardon, because I surely [fol. 57] didn't hear that, I sincerely didn't, or I wouldn't have been beating around the bush as we've been doing.

The Court: All right, you know it now, so just put it over there and forget the statement.

Mr. Mayer: Fine.

The Court: Bring the jury in.

It was my understanding, maybe I didn't say it in exactly that language, but it was my understanding that is what you were going to do, and I think that's what you understood, wasn't it, Mr. Wadden?

Mr. Wadden: Yes, your Honor, and that's what I understood he had been doing all this time.

The Court: That's what I would call it, that's what it looked to me like he's been doing.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: You may proceed.

By Mr. Martin:

Q. Mr. Milosevich, at the time that you were filling out the 1956, '57 returns, do you recall telling Mr. Sansone that you did not know how the cost of the property should be allocated, but that it should be reported, to be on the safe side?

Mr. Wadden: Your Honor, I object to this question, counsel is using the statement you just told him to put [fol. 58] away. He's got it in front of him, and it's the very thing your Honor has already passed on. Now he's doing by indirection what your Honor has told him he couldn't do. As I understand your Honor has ruled.

The Court: I told him he couldn't use the statement. I thought I made myself clear about that, and I'll sustain the objection as to the form of the question.

Mr. Martin: No further questions.

Mr. Wadden: I have no questions, your Honor.

The Court: You can stand aside.

(Witness excused.)

The Court: Call your next witness.

Mr. Martin: Mr. Conley.

JOHN J. CONLEY, being produced, sworn and examined as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Martin:

Q. Will you state your name, please?

A. John J. Conley.

Q. What is your business or occupation?

A. I'm a special agent with the intelligence division of the Internal Revenue Service.

Q. How long have you been a special agent with the [fol. 59] intelligence division of the Internal Revenue Service?

A. Fifteen years, sir.

Q. Sir, was the matter of Michael C. Sansone assigned to you for investigation?

A. Yes, sir.

Q. Did you have occasion to talk with Mr. Sansone?

A. Yes, sir, I did.

Q. When was the first time that you talked with him?

A. On or about April 24, 1960, I made a long distance telephone call to Mr. Sansone and arranged an appoint-

ment for the following week at Phoenix, Arizona, where he was then living.

Q. Did you subsequently see him in Phoenix, Arizona?

A. Yes, sir, I did.

Q. Do you recall on about what date you saw him in Phoenix, Arizona?

A. Yes, it was May 3rd, 4th and 5th, 1960.

(A document was marked for identification as Plaintiff's Exhibit N.)

By Mr. Martin:

Q. Sir, did you have occasion to check the items in the income tax returns of Michael C. Sansone and Helen M. Sansone for the years of 1956 and '57?

A. Yes, sir, I did.

Q. Mr. Conley, I give you what has been marked as [fol. 60] Plaintiff's Exhibit No. A, which is the 1956 return of the defendant.

Mr. Conley, did you have occasion to check the items scheduled on that return?

A. Yes, sir, I did.

Q. Did you have occasion to make an adjustment in any of the items?

A. Yes, sir, I did.

Q. Will you tell us what item you made any adjustment in?

A. I made an adjustment in the item "Other Income" from page 3, capital gains, and I made an adjustment increasing that in the amount of $5,012.59, for an unreported short-term capital gain. The adjusted gross income and the taxable income was increased in a similar amount of $5,012.59.

Q. Were there any other adjustments in the return?

A. I made no other adjustments, sir.

Q. Now, that one item of $5,012.59, will you tell us the basis of that adjustment?

A. The amount of that adjustment of $5,012.59 is derived by allocating the cost of the complete tract of land that Mr. Sansone bought for 22,500, and allocating a por-

tion of that cost to the tract which has been described as the tract sold to the D-X Oil Company.

Q. And that would be the portion in brown on the Exhibit C?

[fol. 61] A. Yes, sir, that would be it.

Q. How did you figure the amount of cost to be allocated to that tract?

A. I used the assessed valuations as shown on the closing statement of the Land Title Company, which showed that the assessed valuation of Parcels 1 and 2 of the tract was $1,040. The assessed valuation by St. Louis County of Parcel 3 of the tract was $2,030, making a total assessed value of $3,070. The D-X tract is the tract described as Parcel 3, having an assessed value of $2,030. applied to the total assessed valuation of $3,070, I used $2,030 as the enumerator of a fraction, arriving at a percentage of 66.12 of the total cost allocated to the D-X tract.

Q. Now, sir, you mentioned the assessed valuation that you obtained from the closing statement. I'll give you Plaintiff's Exhibit I and ask you if that is the closing statement from which you obtained those assessed valuations?

A. Yes, sir, it is.

Q. I call your attention to the bottom of that statement and ask you if you find any signatures there?

A. Yes, sir, I find the signatures, "Michael C. Sansone and Helen M. Sansone."

Q. Will you read to us the sentence appearing immediately above the signatures?

[fol. 62] A. "All of the above figures approved without exception."

Q. And those assessed valuations are figures above that, on that closing statement, above that sentence?

A. Yes, sir, that's correct.

Q. Sir, did you tell us the amount of the cost allocated to the D-X tract?

A. Applying the percentage that I arrived at of 66.12 percent to the total cost of $22,500, to which I added additional cost to the purchasers, notary fees, a dollar, title policy, Parcels 1 and 2, $85.70, title policy, Parcel 3, $75.70, recording warranty deed, $4.25, recording deed of trust,

$7.45, escrow fee, $46, I arrived at a total purchase price of $22,858.70, to which I applied this percentage of 66.12 to arrive at a cost, allocated cost for the D-X tract of $15,114.17.

Mr. Wadden: Your Honor, may the record indicate the witness has been testifying from some document? I don't know what it is, but I think if it hasn't been marked for identification it should be marked for identification.

The Court: If you want to see it on cross-examination or if you want to see it now, you can.

Mr. Wadden: My problem is, if some mark isn't put on it I won't know what to ask for when he gets off the stand, and I don't want to interrupt him now.

The Court: Why don't you come up and look at it?

[fol. 63] Mr. Wadden: I didn't want to interrupt the interrogation, Judge.

(Whereupon, counsel examined the documents.)

Mr. Wadden: Will you keep these available?

The Witness: Certainly.

Mr. Wadden: Thank you, your Honor.

By Mr. Martin:

Q. Now, Mr. Conley, you used the 18,000 figure you just have given us in allocating the cost of the D-X tract?

A. Yes, sir, I allocated the cost at $15,114.17 to it.

Q. Using that cost figure, can you tell us the amount of the profit or income from the sale, or short-term capital gain from the sale of that particular tract?

A. The gross sales price of the tract on March 19, 1956, was $20,000. From that $20,000 I deducted certain expenses of sale, tax adjustment 15.64, revenue stamps $22, notary fee $1.00, for a total deduction of $38.64, to arrive at a net sales price of $19,961.56. I then took the allocated cost of $15,114.17 and deducted from that certain refunded costs in the amount of $165.40, to arrive at a net cost of $14,948.77, which I deducted from the net sales price of 19,961.36, to arrive at a net short-term capital gain of $5,012.59.

Q. Now, sir, when that item, $5,012.59, is added to the amount of taxable income declared by the taxpayer on his [fol. 64] return, what is the adjusted taxable income?

A. The adjusted taxable income for 1956, by making that addition, is $6,513.37.

Q. Do you have the '56 return there?

A. Yes, sir.

Q. Now, sir, calling your attention to the '56 return, which is Plaintiff's Exhibit A, will you tell us where the taxpayer should have placed on his return the short-term capital gain that you have just described?

A. That should have been reported in Schedule D.

Q. Do you find that reported on Schedule D?

A. No, sir, I do not.

Q. Do you find other capital gains reported in Schedule D?

A. Yes, sir, I find a—

Q. Well, you don't have to tell us what they are, sir, at this time, just that they are there.

Now, I call your attention to Plaintiff's Exhibit B, which is the return of Michael C. Sansone and Helen M. Sansone for the year of 1957. Will you examine that return, sir, and tell us if you had an occasion to make any adjustments in the items scheduled on that return?

A. Yes, sir, I did. I made an adjustment, a net adjustment, increasing taxable income $10,144.89.

[fol. 65] Q. Will you tell us the basis for that adjustment?

A. That adjustment reflects the profit that I computed on Mr. Sansone's sale of the tract to the Gulf Oil Company.

Q. That's the tract that is marked in blue on Plaintiff's Exhibit C?

A. Yes, sir, that's correct.

Q. Did you use the same formula in computing the cost of that tract as you used in computing the cost of the D-X tract?

A. Yes, sir, I did.

Q. What percentage of the cost is allocated to the purchase of the Gulf tract?

A. The Gulf tract is part of Parcel 1, and the assessed valuation of Parcels 1 and 2 was shown as $1,040 of the total assessed valuation of the whole tract of $3,070; therefore, the remainder, after applying the percentage of 66.12

to the D-X tract, left a 33.88 percent left for the whole remaining tract.

Q. When you say "whole remaining tract"—

A. Including—

Q. You mean all of this on the west side of Birchwood Drive in color?

A. Including the tract sold to the Gulf Oil Company. In determining the cost of that tract, of that portion sold to [fol. 66] the Gulf Oil Company, I observed that the Land Title Company showed in their closing statement that the assessed valuation of that tract was $520, so I took half of 33.88 percent, or 16.94 percent, as the allocated cost of the tract sold to the Gulf Oil Company.

Q. How much would that be, sir?

A. I arrived at an allocated cost of $3,872.26 for the Gulf Oil Company tract.

Q. What was the sale price of the Gulf Oil Company tract?

A. The gross sale price of the Gulf Oil Company tract was $27,000.

Q. What did you determine to be the long-term capital gain on the sale of that particular tract?

A. I determined a long-term capital gain of $20,692.34.

Q. On the basis of that capital gain what adjustment did you make in the taxpayer's return?

A. I took this long-term capital gain on the Gulf tract of 20,692.34 and offset it against an unreported long-term capital loss of $202.56, which Mr. Sansone had sustained on the sale of some Zenmore Metal stock, arriving at a net long-term capital gain of $20,489.78, of which I took fifty percent, or $10,244.89, and offset that in turn, in part, by a hundred dollars' decrease in Mr. Sansone's income reported in Schedule C from his employment with A. G. Edwards to arrive at a net adjustment increasing his tax-[fol. 67] able income by 10,144.89.

Q. Now, Mr. Conley, you mentioned a change in the salary from A. G. Edwards. Did you find that he had overstated the amount of salary?

A. I don't know whether he overstated it or not. Mr. Sansone reported the figure that was given to him by A. G.

Edwards. In attempting to verify that we were not able to verify that only within a hundred dollars, which is why we reduced it by a hundred dollars.

Q. So you were giving him credit for a hundred dollars less income than is scheduled on the return?

A. That's it.

Q. Did he also report a long-term capital loss of $202.56 that you mentioned?

A. The long-term capital loss was not reflected in the return.

Q. But you found that and you gave him credit?

A. We found that and we gave him credit for it.

Q. Mr. Conley, if this $10,244.89 that you've figured as the taxable long-term capital gain, if that had been treated as income on the 20,400, or roughly the $20,000 figure that you used, had been treated as regular income there, would that have substantially increased the amount of taxes due from the taxpayer?

[fol. 68] Mr. Wadden: Your Honor, I—

Mr. Martin: I'll strike that and make it clearer, your Honor.

Mr. Wadden: It's a little confusing, Judge.

Mr. Martin: If that was your objection—

Mr. Wadden: My objection is that you're asking some hypothetical question not based on the testimony.

The Court: I'll sustain the objection; not even the same as the witness just told you.

By Mr. Martin:

Q. Mr. Conley, what is the amount of taxable income scheduled by the taxpayer on his return?

A. $2,963.94.

Q. And after you made your adjustments and the adjustment for the long-term capital gain, what is the adjusted taxable income?

A. $13,108.83.

Q. Do you have the '57 return?

A. I don't believe I have it, Mr. Martin.

Mr. Martin: Just a moment, your Honor, I seem to have lost the return.

The Witness: I believe I do have it here, I beg your pardon.

By Mr. Martin:

Q. Referring to Plaintiff's Exhibit B, which is the '57 [fol. 69] return, tell us whether or not the long-term capital gain which you have just described is scheduled on that return.

Mr. Wadden: Your Honor—.

A. No, sir, it is not.

The Court: Don't answer when they get up to object, until I pass on it, and if I sustain it, don't answer.

The Witness: All right, your Honor.

Mr. Wadden: I'll withdraw what I was going to say, your Honor.

By Mr. Martin:

Q. Mr. Conley, I show you what has been marked as Plaintiff's Exhibit N. Will you examine it, please, sir?

Do you recognize that document, sir?

A. Yes, sir, I do.

Q. Will you tell us what it is?

Mr. Wadden: May we approach the bench, your Honor, before that answer comes out?

(Whereupon, discussion was had off the record, in the presence but out of the hearing of the jury.)

The Court: Now, what is the question?

(Whereupon, the reporter read the question.)

(Whereupon, discussion was had off the record, in the [fol. 70] presence but out of the hearing of the jury.)

The Court: Take the jury out.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: What is it that you're wanting to do now, Mr. Martin?

Mr. Martin: Your Honor, I'm preparing to lay the foundation for the introduction into evidence of a statement given by the defendant to the internal revenue agent at the time that he was interviewed by him, which is an affidavit dated May 5, 1960, at Phoenix, Arizona.

The Court: And you're wanting to know what, now, offer it into evidence?

Mr. Martin: After laying the foundation, your Honor, I propose to offer it into evidence.

The Court: Let me see it.

Mr. Martin: (Handing document.)

The Court: You say that you're going to object, that it was secured by fraud?

Mr. Wadden: By fraud, your Honor, and also by coercion.

The Court: You want to put some testimony on about it, or what do you want to do?

Do you want to examine this witness about it?

Mr. Wadden: I would just as soon start out with Mr. [fol. 71] Conley. I don't like to take the court's time and I would be perfectly willing to make a proffer to the court of what I intend to prove before taking the court's time to listen to it, because the court may feel that my proffer is not sufficient to prove fraud and coercion, if not, it will save the court's time and the jury's, if your Honor would like a proffer from me.

The Court: What is your position on that?

Mr. Mayer: I would just as soon go ahead and let him establish what he intends to establish from it, your Honor, at this time, so—

The Court: I think we might as well call the jury in and send them home. I don't know why we get into all these problems all the time.

Bring them in.

Mr. Mayer: Your Honor, we knew nothing about this—

The Court: I'm talking about you people, I'm not talking about—

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Ladies and gentlemen, we have some matters with which you are not concerned in the least, and it's going to take me a little time to take care of it, so there's no need of holding you here. You'll be excused at this time until ten o'clock in the morning. In the meantime, do not [fol. 72] discuss the case among yourselves, let anyone talk to you about it or talk to anyone about it. Should there be anything in the papers, on the radio or television with respect to it, do not read it or listen to it.

You can file out at this time and be back at ten o'clock in the morning.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: You may proceed.

Mr. Wadden: Thank you, your Honor.

Voir dire examination.

By Mr. Wadden:

Q. Mr. Conley—

May the record indicate, your Honor, I am showing the witness Government's N for identification, which is an alleged statement made by the defendant?

First of all, Mr. Conley, did the defendant dictate this statement?

A. No, sir, he did not.

Q. Did he write it out in longhand?

A. No, sir, he did not.

Q. Did he type it out himself?

A. No, sir, he did not.

Q. This is a statement that you typed yourself out of [fol. 73] his presence, is it not, sir?

A. The finished statement was typed outside of his presence, however, he approved a draft of it before—beforehand.

Q. Who drew up the draft?

A. I drew it up.

Q. Is there any single word in here that actually he dictated himself?

A. He didn't actually dictate any part of it, no, sir.

Q. Now, you conducted this interview on May 3rd and May 4th, did you not, of the Sansones?

A. May 3rd, 4th and 5th.

Q. Well, you conducted an interview at their house on May 3rd and May 4th of 1960, did you not?

A. Yes, sir.

Q. Tell the judge how many hours this interview took place.

A. I don't know how many hours, Mr.—

Q. You were there from nine in the morning until about lunchtime, you left for lunch, did you not, you would then come back and stay until around five o'clock in the afternoon?

A. We were there that long, that is correct.

Q. Isn't it a fact the first several hours you were there you requested documents and they were produced?

A. That is correct.

[fol. 74] Q. And thereafter, starting with a little after lunch on the first day you started in with a question and answer session with Mr. and Mrs. Sansone, that continued until approximately five o'clock on Tuesday?

A. It wasn't strictly a question and answer session. Mr. Sansone presented a list of his bank deposits and we started off identifying the ones that he had not identified. We questioned him about those particular items.

Q. That's what you did in the morning of the first day, wasn't it, sir?

A. I don't know just how long that extended, Mr. Wadden.

Q. All right. Then you left and then you came back and you questioned them the next day, is that correct?

A. There was no continuous questioning. Most of our time was devoted to looking at records.

Q. Is it your testimony that Mr. Sansone and Mrs. Sansone weren't in the dining room with you most of the time that you were in that house?

A. Either one or both of them were there. Mr. Sansone was gone part of the time.

Q. All right. Now, do you have your original notes taken at the time of the interview of Mr. and Mrs. Sansone?

A. Yes, sir, I do.

Q. How many pages are there?

[fol. 75] A. I don't know offhand.

Q. Well, give us your best estimate.

A. The notes were taken in shorthand and they would—they would cover perhaps a dozen pages, I would say, all told.

Q. A dozen pages in shorthand, is that correct?

A. Yes, sir, something like that. I'm guessing at the dozen. I wouldn't know without counting them.

Q. All right, now, during the course of this interview with Mr. Sansone, Mr. Conley, tell me whether or not you observed Mrs. Sansone burst forth into tears on several occasions?

A. I do recall, I believe, that she was a little bit tearful a couple of times.

Q. And do you remember, Mr. Conley, that when you questioned Mr. Sansone about something and not get an answer that you would like you would say to him, "Well, we'll ask Mrs. Sansone about that. After all, she has had a college education," words to that effect?

A. No, sir, I don't recall making any statement like that.

Q. Didn't make any statement like that?

A. No, sir.

Q. Didn't you make it quite clear to Mr. Sansone that she also was a subject of your investigation at that time?

A. The only thing that I made clear to Mrs. Sansone was that she was on the return. Now, as to what her exact connection with it was, that was the point of our investigation.

[fol. 76] Q. Yes, sir, and you made it quite clear that you were investigating Mrs. Sansone to Mr. Sansone, didn't you?

A. I made it quite clear we were investigating their joint income tax liability.

Q. Now, where were you physically when you gave this statement of yours, which starts out, "I, Michael C. Sansone," where were you physically when you gave this to Mr. Sansone to look at?

Q. I was at his home.

Q. You were at his home, or were you at your office in the Federal Building on May 5th?

A. The original draft of the statement, which Mr. Sansone approved, was approved at the Phoenix office. This final copy was taken to Mr. Sansone's home and he looked at it and signed it at his home.

Q. You're certain of that?

A. Yes, sir, I am.

Q. Now, at the time you showed Mr. Sansone—I want you to think very clearly, Mr. Conley—at the time you showed Mr. Sansone this—either the original, I guess it would be your original draft, did you have a conversation with him about whether he was going to have a right to a hearing in St. Louis with your superiors?

A. Somewhere in the course of the interview I told him [fol. 77] that he would have a right to a hearing before any final action was taken on his case,

Q. Now, Mr. Conley, isn't it a fact that you showed Mr. Sansone this statement and he asked you if he was going to have a right to explain this statement at a hearing in St. Louis, isn't that a fact?

A. The explanation that we were talking about had regard to the whole case, not merely to this one statement.

Q. Yes, he was very interested in having a hearing in St. Louis so he could explain the whole case, wasn't he, sir?

A. That is correct, sir.

Q. And then didn't you tell him words to the effect, "Yes, you'll get a personal interview in St. Louis; you'll be notified"?

A. I told him that he would have a personal interview with my superiors. I don't recall whether I specifically said St. Louis or not.

Q. And thereafter Mr. Sansone signed this document that you had drawn up, didn't he?

A. That conversation was not at the time he signed the statement, as I recall it. I don't believe—.

Q. Do you recall at all or are you now changing positions here?

A. I recall if I had a conversation with Mr. Sansone that he would be offered a hearing before any final action but [fol. 78] I do not recall that that discussion took place at the time this statement was signed.

Q. You just don't recall that it took place?

A. I do not recall that it took place right at that time.

(Whereupon, discussion was had off the record.)

Mr. Wadden: May the record indicate—I guess it should be marked for identification. What is your Honor's pleasure as to how the defendant's—

The Court: Exhibit 1.

(A document was marked for identification as Defendant's Exhibit 1.)

Mr. Wadden: Your Honor, this exhibit is going to be offered for the limited purpose of this hearing. I don't want to be in a position of waiving any right I might have to a directed verdict, if I have any, by offering evidence in the government's case.

The Court: I understand you are limiting it to this hearing now.

Mr. Wadden: May the record indicate I am showing the witness Defendant's Exhibit 1 for identification and ask you, sir, first, if you can identify it? If so, how will you identify it as?

A. I identify it as a letter that I wrote to Mr. Sansone under date of May 4, 1961.

[fol. 79] Q. Did you write that letter to Mr. Sansone in answer to a letter he had written to you?

A. Yes, sir, I did. I wrote it in answer to a letter from him on May 1, 1961.

Q. Wasn't he trying to ascertain from you what happened to the hearing that you had promised him that he was going to get in St. Louis?

A. That is correct, sir.

Q. And you wrote back and said you were sorry the contemplated hearing had fallen through, is that right?

A. That is not what I said, sir.

Q. Well, you said "contemplated hearing", didn't you?

A. What I actually said was "Your case was forwarded to our Omaha, Nebraska, office with the suggestion that in view of your residence and the statements submitted containing your explanation the case be reviewed as to its facts before a formal interview was accorded you. Under the

circumstances I am forwarding a copy of your letter to Assistant Regional Commissioner Holt with the request that appropriate arrangements be made to accord you this formal interview before any final decision is made in your case. I would suggest further that you write a letter to Mr. Frank C. Conley, Regional Counsel, 3001 U. S. Post Office Building, 215 North 17th Street, Omaha 2, Nebraska, requesting this interview."

[fol. 80] Q. Mr. Conley, did you understand the question I just asked you? Didn't I ask you whether "contemplated" —you stated that this was a contemplated hearing he was going to have? What does the first sentence say there?

A. That phrase is in there.

Mr. Martin: I object to arguing with the witness. The document speaks for itself.

The Court: Be overruled. He's already answered.

By Mr. Wadden:

Q. Is there any doubt in your mind that you wrote him saying, "Thank you for your letter of May 1, 1961, calling our attention to the fact that the contemplated personal interview has not been accorded you"?

A. I deny your inference. You are inferring—

The Court: Let's don't argue the matter about it. Answer the questions and quit volunteering so much anyway. You've been in these courts enough to know when these attorneys start objecting they've got the right to object. Now listen to the questions and answer them. You've got an attorney that will take care of the legal part of it.

By Mr. Wadden:

Q. Did you write him that letter?

A. Yes, sir, I did.

Q. It was written by you, was it not?

A. That is correct.

Q. Now, at the same time that you presented your state-[fol. 81] ment here for Mr. Sansone to sign, you presented a statement for Mrs. Sansone to sign, didn't you?

A. That is correct, yes, sir.

Q. And the statement that you presented for Mrs. Sansone to sign more or less removed her from any criminal liability, did it not?

Mr. Martin: Your Honor, I'll object to the form of that question.

The Court: Be sustained as to form.

By Mr. Wadden:

Q. Well, can you give us an opinion as to whether this statement was favorable to Mrs. Sansone or unfavorable?

Mr. Martin: Objection, if the court please, the statement—

The Court: Isn't the statement available?

Mr. Wadden: Yes, your Honor, it is, and we don't have a jury here and I don't think I'm going to mislead anybody.

May the record indicate, your Honor, I'm now showing the witness Defendant's Exhibit No. 2 offered for the limited purpose previously described?

(A document was marked for identification as Defendant's Exhibit 2.)

By Mr. Wadden:

Q. Will you look at this statement and tell me, first, if you can identify it, and, if so, what you identify it as?

[fol. 82] A. I identify it as a copy of a statement that I obtained from Mrs. Helen M. Sansone in the form of an affidavit on May 5, 1960, at Phoenix, Arizona.

Q. And is that a statement not favorable to Mrs. Sansone as pertains to your investigation?

Mr. Martin: Objection, calling for a conclusion from the witness, your Honor.

Mr. Wadden: Well, I'll let the judge read it if his Honor will take the time. (Handing to the court.)

By Mr. Wadden:

Q. Now, I assume this statement which starts out, "I, Helen M. Sansone," was also written by you?

A. It was written out by me in the form of a rough draft which Mrs. Sansone read and approved and then the final copy was typed by me at the Phoenix office and taken out to the home of Mr. and Mrs. Sansone where it was signed.

Q. In other words, nobody dictated this statement to you; you wrote it out, is that not correct?

A. That is correct, based on what the taxpayer and his wife told me.

Q. Wasn't it basically after you told—showed this document to Mr. Sansone that you handed him his own statement and said, "All right, this is what you're going to say"?

A. No, sir, I didn't make any statement like that at all.

[fol. 83] Q. When it came time to sign these two statements on May 5th of 1960, didn't Mrs. Sansone sign her statement first in his presence?

A. I don't recall who signed the statement first. I think they were both signed simultaneously.

Q. Didn't Mr. Sansone tell you when you handed the statement to him to sign on May 5th that there were inaccuracies in it, and this is one of the reasons that he wanted an opportunity to explain to your superior about this statement in the case?

A. No, sir, he did not say there were any inaccuracies in there.

Q. You are certain of that?

A. I'm positive of that.

Q. Because if he had told you that you would, of course, have changed it, wouldn't you?

A. Yes, sir, I would.

Mr. Wadden: Your Honor, I think that is basically all the questions properly within the realm of this motion I can ask this particular witness. I respectfully suggest to your Honor that it is obvious that this witness told Mr. Sansone—he doesn't seem to know when he told him, but told him that he would have an opportunity to explain the case and this statement in St. Louis to his superior, because Mr. Sansone, your Honor, was very much interested in [fol. 84] talking to his superior and having him present at the time because of the nature the interview had taken down there in Phoenix, Arizona, and Mr. Sansone told him at

the time that the statement was incorrect, and very incomplete, your Honor.

You had exactly twenty-one typed lines having to do with the subject matter of this case which he says represents a fair interview that went on for two days. Mr. Sansone felt it was incomplete. He felt it was unfair, but, your Honor, he basically felt that if he didn't sign pretty much what the government wanted him to sign that they were going to indict Mrs. Sansone also, and we feel under the circumstances, your Honor, in view of the document of facts, that such a hearing was promised by this witness, we definitely feel, your Honor, that this may be unknowingly by the witness, but this document, the signature thereon, was procured by fraud and certainly some amount of duress involved in this man's feeling for his wife, and I would move, your Honor, to suppress it.

Mr. Mayer: Your Honor, I don't think the testimony that has been developed shows anything like that of the kind. In fact, he keeps talking about this promised interview, but I don't think anything was promised to this man because he said that he would have an interview, but I don't think any promises were made. I think the court undoubtedly knows that in many instances taxpayers are given [fol. 85] hearings. In this case he perhaps was not.

The Court: Are you all still wanting to introduce it at this time, after it is formally—

Mr. Mayer: If Mr. Martin feels he wants to introduce it, that is our position, that they surely have developed no information—

Mr. Martin: Your Honor, the testimony that has been given—

The Court: I don't care anything about the testimony given; I asked a simple question. It hasn't anything to do with the testimony.

Mr. Martin: Yes, your Honor, we still feel—

The Court: You still want to introduce it?

Mr. Martin: Yes, your Honor.

The Court: Well, I will give you a ruling on it in the morning.

Mr. Wadden: Your Honor, I didn't hear what your Honor said.

The Court: Have you got all the testimony that you want on it? Are you relying purely on this?

Mr. Wadden: No, your Honor, I can put Mr. Sansone on. I made a proffer to the court. Of course, they have not had the right of cross-examination, but I made a proffer [fol. 86] as to what his testimony would be on the subject. I'll be glad to put him on. I certainly don't want to take the court's time unnecessarily. Also, of course, if your Honor desires, and I think she is a party in interest, which I think your Honor recognizes—

The Court: Gentlemen, I'm not trying your lawsuit. You can put on what you want to. I sent the jury out so you could put on any testimony you wanted to put on; if you have any testimony you want to put on, put them on. I said I would determine between now and in the morning what I would do with it. I can't determine yet what I'm going to do with it.

Mr. Wadden: May I put Mr. Sansone on for this limited purpose at this time? He's going to take the stand anyway.

The Court: At the rate we're going we won't be through with this lawsuit before sometime the latter part of next week. I don't know when I've been in a case that has dragged and messed around as much as this one. The testimony that you have had here you should have been able to put on in an hour, and we have been here the whole blessed day and we're not even through with this other witness. They're either not ready, they haven't even talked to them, or they don't know what they're doing. It's just a mess.

If you want to put him on, let's get him on because in the morning we're going on with this testimony. I've set [fol. 87] this case on top of a bunch of civil cases to begin with, and kicked those boys around, and the least I can do is to keep you people trying your lawsuit. If you want him, let's get him on; if you want her, let's get her on.

We normally adjourn at four-thirty. I guess we'll get out at about seven.

(Witness excused.)

MICHAEL C. SANSONE, being produced, sworn and examined for the purpose of voir dire examination, testified as follows:

Direct voir dire examination.

By Mr. Wadden:

Q. Mr. Sansone, may the record indicate that I'm showing you a copy of Defendant's Exhibit No. 1. I will ask you to tell me whether you can identify it or not.

A. Yes, sir.

Q. Speak up now, Mr. Sansone.

A. Yes, sir, I can identify it.

Q. What do you identify it as?

A. I identify it as the statement Mr. Conley handed me to sign in Phoenix, Arizona, on May 5th, 1960.

The Court: Either you're wrong or my notes are wrong. Exhibit 1, my record shows, is a letter to Sansone from the St. Louis office.

[fol. 88] Mr. Wadden: I think you're right, your Honor.

The Court: Exhibit N, if you're talking about the statement you had here a while ago.

Mr. Wadden: I'm sorry, Judge.

By Mr. Wadden:

Q. Is that—

A. This is a copy of the statement Mr. Conley handed me in Phoenix, Arizona, on May 5th.

Q. Now, did you sign that statement immediately when he handed it to you?

A. I did not.

Q. Would you tell his Honor what took place, what you said, if anything, to Mr. Conley, what Mr. Conley said, if anything, to you, during the period that it was handed to you until the time that you signed it?

A. Well, I asked Mr. Conley, I told Mr. Conley that this statement was out of context, that it did not—there was parts of it that are inaccurate, and that he told me go ahead and sign it, that I would get an opportunity to explain it, that it was a preliminary—that this was a preliminary investigation.

I would like to explain two days prior to this, we were interrogated at our house. Now, this was done in the Federal Building, or the Federal Building in Phoenix, Arizona, when he handed me this statement. For the two days prior, [fol. 89] we were interrogated, there were times when he would be asking me questions that I didn't give—maybe I gave a long explanation—didn't give the answers just right, he would ask me again in a different way. Then he would—if that didn't seem to satisfy him, he would then say that "your wife has a college education," or he would say, "You realize that your wife prepared the information that went into the statement, that she jointly signed this, and that she is also responsible," and Mr.—I asked Mr. Conley again at the time that he said that this was going to be—that it was a preliminary hearing that I would get the opportunity, I asked him again, "Will I get the opportunity?" I said, "Where?" He said in St. Louis. I said, "With whom?" "With my immediate superior." I asked if he would be there, he said yes, he would. And that's on the basis that I signed this statement.

Q. Would you have signed it, sir, if Mr. Conley had not promised you this hearing?

A. Absolutely not.

Q. Why did you want the hearing in St. Louis?

A. Because it didn't contain what I had explained to him for the two days prior.

Q. How many hours did Mr. Conley interrogate you and your wife on May 3rd and May 4th?

A. They were there from nine till five, with the excep- [fol. 90] tion of an hour for lunch, and I—the—every bit of ninety percent of that time that there were questions and answers going on.

Q. Did you believe you really had any choice when Mr. Conley handed this to you to sign as to whether to sign it or not to sign it?

A. I did not if I wanted to protect my wife.

Q. You had already seen the statement which they had prepared for your wife which more or less exonerated her?

A. Yes, sir.

The Court: Just read the statement, I'll say to you that after having read it, if there's anything in there that exonerates her, I don't know what it is. I mean I just don't understand it, if you call that an exoneration.

Mr. Wadden: All right, let's say, your Honor, I should not have put it in those terms. It's more or less allowing her to state that she had no criminal intent, did not know of the responsibility that she had in connection, if any, with the '56 and '57 sales, as I read it.

I'm sorry, your Honor, if I improperly characterized it, which I did.

The Court: I mean it's purely self-serving from that standpoint. They say, "With reference to the real estate purchases and sales as described in the affidavit submitted [fol. 91] by my husband on this same date, which I have read, I wish to state that I was under the impression and belief that we were entitled to sell all this property before we had to report the sales in our joint income tax returns."

Well, of course, I don't believe that there's a jury in the world that would believe that statement, Mr. Wadden, because if that were true, everybody could buy a thousand acres and keep ten and you never would pay any tax. I mean that's just a self-serving document that is so ridiculous that I don't believe that she could even believe it. Of course, they prepared it, I suppose that's what she told them, "I also wish to state that neither I nor my husband had any intention"—

Well, I've never had anybody in any of these cases that ever said that they ever had any intentions—all of them have got no intentions, they say, to do it, but the trouble about it is that some of the jurors don't agree with them.

I mean I don't think that that statement exonerates her. It's purely a matter of opinion, but I wouldn't put that impression on it. They evidently did, I guess, I don't know. Anyway, they didn't indict her.

Mr. Wadden: Yes, your Honor, they did.

The Court: But if that was anywhere close to what the situation is, you would have more little, old, puny pieces of property scattered around that never was sold than you [fol. 92] could ever think of.

Mr. Wadden: That is not our defense, your Honor.

The Court: I don't think so. Reminds me of a story one time that I told some of them of a salesman that came through and told the fellow that he wanted to sell him a whole carload of stoves and general merchandise, and the fellow said he didn't have the money. He said, "Well, you don't have to pay for them until you sell them all." He came back about six months later and said, "Well, have you sold them all, or how did you come out?" The fellow said, "Got one left," so the salesman said, "What do you want to take for it?" The fellow said, "I wouldn't sell it for a million dollars."

But that's the deal you get into on that thing.

Mr. Wadden: Judge, I think I'll rest my motion on the testimony, and on the letter submitted.

The Court: Do you have any questions?

Mr. Mayer: Just a few, your Honor.

Cross voir dire examination.

By Mr. Mayer:

Q. Mr. Sansone, you worked at the A. G. Edwards Company here, isn't that correct?

A. Yes, sir.

Q. And, actually, you worked in the real estate division of that company?

[fol. 93] A. I would like to explain that it was not a division, sir, it was a one-man operation of a—well, it was just one individual in there that had an office for the convenience of some of our stocks and bonds clients, and I did work in there, very small time, yes, sir.

Q. And, actually, you had been in the real estate business on your own prior to this, isn't that correct, sir?

A. Prior to what, sir?

Q. Prior to this occasion of purchasing this land out on Manchester.

A. No, sir.

Q. You hadn't ever purchased any property yourself?

A. Except my home.

Q. That was the only thing?

A. That's the only property that I ever purchased, yes, sir, prior to that purchase of Ballwin.

Q. You didn't purchase any property for your uncle or manage any property?

A. I—

Mr. Wadden: That wasn't the question he asked, your Honor. I suggest we are going to be here till seven if he doesn't address himself to the statement that I'm trying to suppress.

Mr. Mayer: Well, I'll try and get around to that.

[fol. 94] By Mr. Mayer:

Q. Actually, the first portion of that statement said, "I also understand that any statements or evidence I submit can be used by the United States in any future proceeding, and that I have the right to employ an attorney. I am making this statement freely and voluntarily in order to explain the facts and circumstances relative to the preparation and filing of our joint income tax returns for 1956 and 1957," also '58. Isn't that correct, sir?

A. I didn't catch what the question was.

Q. Wasn't that in there?

A. That's in the statement that Mr. Conley prepared, yes.

Q. And that was prepared there when you put your signature on the end of it, wasn't it? Isn't that correct?

A. Yes, it was.

Q. And there isn't anything in here that you say that something in there isn't correct, do you, sir?

A. I would have to go through it thoroughly again, sir.

Mr. Wadden: Mr. Sansone, if the jury is ever going to hear you, you've got to start talking louder. I can't hear you.

The Court: Why don't you give him Exhibit N, which is easier to read?

[fol. 95] Mr. Mayer: Do you have that?

Mr. Wadden: Yes, I think I do (handing document).

By Mr. Mayer:

Q. Have you read it all?

A. Well, I read that first paragraph.

Q. That was in there, wasn't it, sir, when you signed it?

A. Yes, sir.

Q. And it says there you "freely and voluntarily make this statement," isn't that correct?

A. Well, I like to explain freely and voluntarily, sir. I explained before, that two days prior that my wife, at the time of the interrogation, Mr. Conley would say that she's also responsible, he certainly implied that she was. She cried three or four times, each of those days that they did that, and I just—

Q. Then you didn't sign it freely and voluntarily?

A. Interpretation of "freely and voluntarily." I signed the statement, yes, I did.

Q. And Mr. Sansone, Mr. Conley was in your home, you could have told him to leave at any time, couldn't you, sir?

A. Mr. Conley was not in my home at the time I signed that statement. I was in the Federal Building.

Q. All right, now for two days prior to that he was in your home, wasn't he, sir?

A. He certainly was.

[fol. 96] Q. You could have asked him to leave at any time you wanted to, couldn't you, sir?

A. At that point I—

Q. Well, couldn't you have asked him to leave at any time?

A. I don't know if I could have or not.

Q. You didn't know that?

A. No, I didn't know.

Q. He told you you had a right to an attorney, didn't he, sir?

A. He did.

Q. Didn't he tell you that you also did not have to make any kind of a statement?

A. I told him that I—as far as—"any kind of statement," meaning this?

Q. Yes.

A. I don't recall his saying that.

Q. Well, now—

A. As far as—I can't recall the—the lengthy thing that they start right off with, that they recite, I don't—

Q. Well, that's written in here, isn't it, sir? You read this before you signed it, didn't you, Mr. Sansone?

A. Yes, I did.

Q. And right there it says, "I have been fully advised [fol. 97] and fully understand I have the right under the Constitution to decline to make any statement or furnish any evidence that may tend to incriminate me under the laws of the United States." That's in there too, isn't it, sir?

A. Yes, it is.

Q. And that was in there before you signed it, wasn't it, sir?

A. Yes, it was.

Q. And you still want—

A. I certainly—I would like to explain that.

Q. Go ahead.

A. As I told you before, with his giving me my wife's statement—or I didn't explain that to you before, but it's been explained. He gave me my wife's statement and I gave—and he gave me that statement, and I asked him, or he told me that I would be given the opportunity to explain the thing because the thing just did not contain the explanation that I had given him, it was words out of context, there were many inaccuracies in there, and I explained that to him.

Q. Would you look at the last paragraph there, sir?

A. Where is that?

Q. Right here (indicating). Read that out loud, sir.

A. "I have read the above statement on this page and have initialed any corrections shown. I fully understand this statement and it is true, accurate and complete to the [fol. 98] best of my knowledge and belief. I made this statement voluntarily without any threats or rewards, or promises of reward or immunity having been made to me in return for it."

Q. Now, that was in there when you signed it, wasn't it, Mr. Sansone?

A. Yes, it was.

Q. And you read that, didn't you, sir?

A. I did.

Q. And you still went ahead and signed this?

A. I did, I would have signed anything at that time.

Q. And now you're telling the court that this isn't a correct statement, though?

A. Yes, I am.

Q. Mr. Sansone, how much education have you had, sir?

A. I had less than a year of—less than a year of college.

Q. Did you graduate from high school, isn't that correct?

A. I would like to explain that. I didn't graduate from high school. I didn't complete my fourth term, but I went to work to support my mother and then I went into service thereafter, and while in the service I wrote to my high school in St. Louis and they sent me a diploma, so you asked me if I graduated, I got a diploma from high school. [fol. 99] Q. And with that diploma you were admitted to the Washington University?

A. Yes, sir, School of Architecture; yes, sir.

Q. And you worked for A. G. Edwards as a security salesman for how many years?

A. To what time, sir?

Q. Well, for how many years?

A. Totally, up to now you mean?

Q. Well—that's up to you. How long have you worked as a security salesman, Mr. Sansone?

A. From 1954 to 19—well, to the first of this year.

Q. And you have dealt in real estate, haven't you, sir?

A. You mean dealt or—

Q. Bought and sold real estate?

A. For myself?

Q. Yes, sir.

A. Yes, sir, but this was my first piece.

Mr. Mayer: I think that's all the questions I have, your Honor.

The Court: Any more testimony?

Mr. Wadden: Your Honor, I'll stand on the testimony before your Honor.

The Court: Well, you can stand aside and I'll take a look at it overnight.

(Witness excused.)

[fol. 100] The Court: Announce a recess until ten o'clock in the morning.

(Whereupon, court stood at recess until ten o'clock a.m. of Tuesday, July 2, 1963.)

Morning Session, Tuesday, July 2, 1963.

Pursuant to adjournment as aforesaid, at ten o'clock a.m. of Tuesday, July 2, 1963, the court met present and presiding as before, and the trial continued as follows:

The Court: You gentlemen may proceed.
Mr. Wadden: May we approach the bench, your Honor.
The Court: Gentlemen—this is off the record.

(Whereupon, discussion was had off the record, in the presence but out of the hearing of the jury.)

The Court: I'll overrule the objection to Exhibit N.
Mr. Martin: Mr. Conley.

JOHN J. CONLEY resumed the stand and testified further as follows:

Direct examination (continued).

By Mr. Martin:

Q. State your name, please, sir.
A. John J. Conley, C-o-n-l-e-y.
Q. You're the same John J. Conley who was on the witness stand and testifying at the time the court recessed yesterday evening?
[fol. 101] A. Yes, sir, I am.
Q. And, sir, you understand that you're still testifying under oath?
A. Yes, sir, I do.

Q. Now, Mr. Conley, I think I asked you if you had any conversation with Mr. Michael C. Sansone about the matter in controversy at the present?

A. Yes, sir, I did.

Q. When did you first talk to Mr. Sansone?

A. On May 3rd, 1960.

Q. Did you have conversations with him pertaining to the transfer of the D-X plot which is outlined on Plaintiff's Exhibit C, and the transfer of the Gulf plot outlined on Plaintiff's Exhibit C?

A. Yes, sir, I did.

Q. Did you make notes of the conversation pertaining to the transfer of those two plots?

A. Yes, sir, I did.

Q. Did your conversation relate to the reporting of the transfer of those transactions on his income tax returns for 1956 and 1957?

A. Yes, sir, it did.

Q. And after your conversation, sir, you reduced the [fol. 102] summary of those conversations, notes and your work papers?

A. Yes, sir, I did.

Q. And after making the notes, sir, did you subsequently draft a statement or affidavit?

A. Yes, sir, I did.

Q. I will show you what has been marked as Plaintiff's Exhibit N and ask you to tell us what that is, sir.

A. This is an affidavit that I obtained from Mr. Michael C. Sansone, which was subscribed and sworn to before me on May 5th, 1960, at Phoenix, Arizona.

Q. Sir, did you write that affidavit up?

A. Yes, sir, I wrote the affidavit.

Q. And the material you incorporated in that, where did you obtain that?

A. I obtained that from my notes, shorthand and handwritten notes that were made during the course of interview of Mr. Sansone on May 3rd and 4th.

Q. Do you see any signatures on the bottom of the affidavit, sir?

A. Yes, sir, this bears the signature of Michael C. Sansone, my signature, special agent, and the signature of Henry G. Purk, internal revenue agent, as witness.

Q. Now, sir, at the time Mr. Sansone signed that affidavit, had you administered an oath to him?

[fol. 103] A. I administered an oath to him when he signed it, immediately before he signed it.

Q. Prior to the time that he signed it did he suggest any changes in the affidavit?

A. Yes, sir, he requested an addition to the rough draft that I had prepared. This addition was incorporated in the second last paragraph of the affidavit. He approved this addition, and then this final draft of the affidavit was prepared, was prepared by me, rather, and then signed by him. I swore him to it.

Q. And after you typed the final draft which you hold in your hand, sir, did he suggest any changes to be made in it?

A. No, sir, he did not.

Mr. Martin: If the court please, the government will offer in evidence Plaintiff's Exhibit N.

Mr. Wadden: No objection, your Honor.

Note my former objection.

The Court: Be overruled.

(Which said Plaintiff's Exhibit N was received in evidence.)

Mr. Martin: If the court please, the government asks leave to read the affidavit to the jury.

The Court: Very well.

Mr. Martin: Ladies and gentlemen of the jury, omitting [fol. 104] the formal caption, the affidavit reads as follows:

> "I, Michael C. Sansone, 62 West Vernon, Phoenix, Arizona, state that:
>
> "I reside at 62 West Vernon, Phoenix, Arizona, and formerly resided at 6331 Pershing, St. Louis, Missouri, before moving to my present address. I am employed as a registered representative of A. G. Edwards & Sons in the Phoenix office. I make the following statement freely and voluntarily relative to the joint income tax

liability of myself and my wife, Helen C. Sansone, for the years 1956, 1957, and 1958. I have been advised and fully understand that I have the right under the Constitution of the United States to decline to make any statements or furnish any evidence that might tend to incriminate me under the laws of the United States. I also understand that any statements or evidence I submit can be used by the United States in any future proceeding, and that I have the right to employ an attorney. I am making this statement freely and voluntarily in order to explain the facts and circumstances relative to the preparation and filing of our joint income tax returns for 1956, serial number CE 80820, for 1957, serial number CE 80847, and for 1958, serial number CE 200128, which I have today inspected and identified my signature.

"These returns were prepared by my wife's brother, [fol. 105] Steve N. Milosevich, from a work paper we presented to him each year showing our income, expenses, and deductions, which had been prepared by my wife.

"With reference to a tract of land in St. Louis County, Missouri, adjacent to Birchwood Acres Subdivision, which I acquired March 16, 1956 for a total purchase price of $22,500, and of which I sold a part of the tract to the D-X Sunray Oil Company in March, 1956 for a total sale price of $20,000, another part of the tract to the Tremarco Corporation in 1957 for a total selling price of $27,000, and two other portions in 1959, and of which I still retain a part of the original tract, I wish to make the following statement. I did not report the 1956 sale in our 1956 joint income tax return because I thought that I was entitled to recover my entire cost before reporting any sales in my income tax returns. I did not report the 1956 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have re-

ported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment"—

Mr. Wadden: Your Honor, could we get together be-
[fol. 106] cause—may I look at the statement he's reading?

The Court: Yes.

Mr. Martin: Pardon me, I made a mistake on the reading. The sentence should read, "I did not report the 1956 sale in our joint income tax return for 19"—pardon me, I made a mistake again.

"I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.

"My brother-in-law, Steve Milosevich, knew that we had this real estate and had made several sales, but he did not advise us whether or not to report the 1956 and 1957 sales and the matter was not discussed with him as he merely prepared the returns from the workpaper we gave him in these years.

"During the current examination of our income tax returns several other smaller items have been brought
[fol. 107] to my attention that were not reflected in our joint income tax returns, such as a small item of approximately $375 profit from the operation of a 1956 joint venture selling Christmas trees, a rental payment for the use of a lot I controlled, and a lease commission. These omissions were not intentional and were the result of negligence and not intent to evade taxes.

"I have read the above statement on this page and have initialed any corrections shown. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made

this statement voluntarily without any threats or rewards, or promises of reward or immunity having been made to me in return for it.

"Subscribed and sworn to before me this 5th day of May, 1960, at Phoenix, Arizona.

"John C. Conley, Special Agent, Internal Revenue Service.

"Michael C. Sansone.

"Witness: Henry G. Purk, Internal Revenue Agent."

By Mr. Martin:

Q. Mr. Conley, you made no adjustments in the income tax return of the taxpayer for the items mentioned in the statement, did you?

A. No, sir. I considered those technical items and I did not make any adjustment for them in the computation of this case.

[fol. 108] Mr. Martin: No further questions, your Honor, of this witness.

Cross examination.

By Mr. Wadden:

Q. Mr. Conley, how long have you been a special agent with IRS?

A. Fifteen years, sir.

Q. During that time you have investigated many cases, is that correct?

A. Yes, sir, that's correct.

Q. Incidentally, Mr. Conley, I don't know much about tax law and I couldn't follow you yesterday when you were talking about how you arrived at the apportionment. You were talking about 20,000 and 10,000. Just so I understand clearly, what is the actual tax? I'm talking about the actual money that you say Mr. Sansone owed the government in 1956.

A. Based on the computation that I've made, the additional tax would be $1,052.78 for 1956.

Q. 1,052.78, is that right, sir?

Now, would you answer the same question as to the year 1957?

A. For the year 1957—

Mr. Martin: If the court please, I'll object because he [fol. 109] has not testified as to the amount of the actual tax due. He has testified to the taxable income.

The Court: Be overruled. This is cross-examination. This man is supposed to be an expert.

By Mr. Wadden:

Q. All right, 1,052 for 1956. Now, what was your answer for '57?

A. For the year 1957, based on the computation that I made, which assumes that Mr. Sansone is entitled to capital gain from the time of this 1957 real estate sale, the additional tax would be $2,456.46.

Q. Two thousand four hundred how much?

A. $2,456.48.

Q. What do you mean, Mr. Conley, when you say if he has a right to this capital gain?

A. I mean by that, Mr. Wadden, that I'm not entirely certain that he's entitled to capital gain from the time of this 1957 sale, but for the purposes of being conservative and showing the lowest tax possible I gave him the benefit of capital gain from the time in my computation.

Q. He held the land for over a year when he sold the piece to Gulf?

A. Yes, sir, he had.

Q. Now, Mr. Conley, how many different methods are there of apportioning the cost that is attributable to the taxpayer on the D-X sale and the Gulf sale?

[fol. 110] A. The cost may be allocated among a number of approved methods. Among these—

Q. How many are there?

A. —approved methods are front footage, release prices, tentative sale prices and assessed valuation.

Q. Now, I believe your partner in this case was Mr. Purk, is that correct?

A. That is correct, sir.

Q. That's the gentleman who was in the court room with you when the case started, isn't that true?

A. That is correct, yes, sir.

Q. And Mr. Purk drew up the allocations himself, did he not, as pertains to the sale of D-X and Gulf?

A. Yes, sir, he did.

Q. And in fact it was upon those allocations that the taxpayer paid the tax for the years '56 and '57, was it not?

A. I don't know that, sir.

Q. You don't know that?

A. I don't know what basis the payment was made on.

Q. You don't know whether it was on your basis or Mr. Purk's basis, is that correct?

A. No, sir, I think it was on Mr. Purk's basis, but I'm not certain on that.

Q. And Mr. Purk's basis was different from yours, wasn't [fol. 111] it?

A. Yes, sir, that is correct.

Q. What did he use?

A. He used the front footage.

Q. Now, did you consider in dealing with the Gulf sale when you made up that work sheet, I think you have, did you consider in dealing with this Gulf sale actually you were dealing with all one piece of property, or did you think this was a separate piece of property from the property in yellow?

A. I considered it one piece of property until the Gulf portion was sold, and then it became a separate piece of property.

Q. Well, now, do you have with you your compilations in connection with the Gulf sale on how you arrived at the price of $20,692.34?

A. Yes, sir, I do.

Q. And, of course, you have already testified you were being very conservative for the taxpayer, so you did this to the best of your ability, is that correct, when you drew up this schedule which is a schedule of gains on the sale of real estate, Ballwin, St. Louis, Missouri, on assessed valuation basis? That is your Appendix B, I believe.

Mr. Wadden: Your Honor, may I—while he's looking, may I interrupt this to make a request of the court? I request under Title 18,3500, any reports that this agent has [fol. 112] made in connection with this case, that he has either drawn up himself or he has adopted, or any reports which are the basis for the testimony that he is giving here today. I've asked for this material earlier, the government is on notice. In fact, I hoped to get it overnight but it wasn't forthcoming.

Mr. Mayer: Well, your Honor, he wasn't entitled until after this witness had testified, but I mean we'll be happy to furnish it to him at this time.

The Court: Give it to him.

Mr. Wadden: I will continue with my cross while Mr. Rosenblum—while he examines it, so that it won't hold the court up and the jury up.

Mr. Mayer: We'll furnish them to him.

The Court: You understand he can't examine him?

Mr. Wadden: On, no; no, sir, but I would have to stop and read it, Judge, and he's forgotten more about this field than I know, so—

Mr. Martin: Mr. Conley, will you pick out in the file what they are?

Mr. Wadden: I'm sorry to interrupt you this way, Judge, but I—

Mr. Mayer: Will the record show that we are turning these over to the defendant?

[fol. 113] The Court: May so show.

By Mr. Wadden:

Q. Mr. Conley, you testified that you took notes in connection with this interview, is that correct, sir?

A. Yes, sir, I did.

Q. Now, are those notes included in this package you gave us?

A. Yes, sir, they are.

Q. Do you use some type of shorthand system?

A. Yes, sir, I do. I write Gregg shorthand.

Q. Gregg?

A. Gregg shorthand.

Mr. Wadden: Excuse me one minute, your Honor.

By Mr. Wadden:

Q. I believe, Mr. Conley, before I interrupted this examination I was directing your attention to the sale of real estate, the memorandum of the sale of real estate involving the Gulf property. Now, do you have that?

A. Yes, sir, I do.

Q. I'm showing the witness a document entitled "Appendix B." Is that your work?

A. Yes, sir, that is.

Q. I notice that you have down here $1,028.54, materials from Schurk, S-c-h-u-r-k, Iron Company. Was that attributable as a cost of the sale of this land?

[fol. 114] A. Yes, sir, in my opinion it was.

Q. Would you just tell me why you thought in your opinion that it was? Did you find out first of all, Mr. Conley, what was gotten from Schurck and for what purpose?

A. I interviewed Mr. Sansone, and he said he had obtained some lumber from Schurck and I assumed that that's what that amount is.

Q. You assume that that is what the amount is?

A. That amount came from his check, I'm sure.

Q. Didn't Mr. Sansone tell you that this lumber was obtained to use on this yellow piece of property around the creek area?

A. No, sir, I didn't understand that it was for the property around the creek area. I understood it was for use on the whole tract.

Q. For use on the whole tract?

A. Before the Gulf sale, yes, sir.

Q. Did you charge off the whole price against the Gulf sale?

A. I included it in the total amount charged off against the Gulf sale, yes, sir.

Q. Why didn't you allocate it like you say he should have been doing? Why didn't you allocate part of the money for this piece of property and the rest for this property [fol. 115] (indicating)?

A. I could have done it that way.

Q. But you didn't do it that way, did you?

A. No, sir, I did not.

Q. Now, you heard of Kelly's Construction Company?

A. I don't know, sir, that I have.

Q. Well, you have down here 181.80.

A. Yes, sir, I recall that.

Q. That's Kelly's Construction Company, is it not?

A. If I recall correctly, that's a tree removal outfit.

Q. Do you know the name of it?

A. Seems to me that it's B. Kelly.

Q. Now, how much did you take off the sale price in connection with Mr. Kelly's company?

A. I would have to make a computation here one minute.

Q. Well, if I suggested $181.20 that was paid to Mr. Kelly's company, would that be what you took off?

A. No, sir. That includes two amounts. That includes an amount of $18, one-half of the cost of a fireplug, and the amount paid to Kelly. The amount paid to Kelly would be, according to the computation that I'm making here, $163.20.

Q. 163.20. Now, did you go see Mr. Kelly and find out where the work was done that he did on the land?

A. No, sir, I did not.

[fol. 116] Q. Did you ascertain from Mr. Sansone that part of the work done was to take a bulldozer and work in this creek?

A. No, sir, I don't recall asking him about that. We discussed with him in general what costs he had in connection with the tract. Now, I don't recall specifically whether there was a bulldozer or not.

Q. Well, did you just arbitrarily decide to put this expense down against the sale of this Gulf property?

A. From my conversation with Mr. Sansone, it was my understanding that he contemplated starting a nursery business until the time that he had made this sale to Gulf and it was my understanding that this whole tract was going to be used for the nursery business and the nursery business was not abandoned until after he sold this property to Gulf, and on that basis, why, I put all of this cost against the Gulf tract.

Q. Even though you didn't know where it was spent on the land?

A. That is correct, sir.

Q. You have interest, Antonio Sansone, $300.00. Is that correct?

A. Yes, sir.

Q. What did that have to do with the Gulf property?

A. It had to do with the cost of the whole tract, and I considered that the same way that I considered these [fol. 117] others, as additional cost of the tract.

Q. What did it have to do with the cost of the tract? Will you please tell me? Incidentally, who is Mr. Antonio Sansone?

A. I understand from Mr. Sansone that that was his father.

Q. This was interest on a loan, is that correct?

A. Yes, sir.

Q. What did interest on a loan to his father have to do with the sale of the Gulf property?

A. It was part of the carrying cost of the whole tract.

Q. You mean a loan from his father, that he pays interest back to his father is a part of the carrying cost of the Gulf piece?

A. It can be handled either as an addition to his itemized deduction for interest in his return, or he can elect—he can elect to add it to the cost of the tract, is my understanding.

Q. You made the election here, didn't you, Mr. Conley?

A. In my computation I added the cost of the tract, yes, sir.

Q. Just arbitrarily?

A. Arbitrarily, if you will. I had to put it one place or another.

[fol. 118] Q. And it wouldn't have made any difference in the outcome of the tax he paid, would it, whether you put it on the cost of this land and the capital gains basis or whether you allowed him to take it as normal business expense?

A. If he had taken it as a normal deduction, there would have been a reduction of tax of around $110.00.

Q. He would have owed less tax, wouldn't he?

A. Yes, $110.00.

Q. And I see here you've got charges of interest with Anna Sansone, A. G. Edwards, interest with House Hunters. Now, House Hunters was directly connected with this land, wasn't it?

A. It was directly connected with the whole tract, yes, sir.

Q. But the others didn't have any bearing whatsoever to do with this tract as far as you knew, that is, the other loans that he had outstanding?

A. There was no deed of trust on there, but it was my understanding that it was borrowed in connection with the land.

Q. Where did you get this understanding?

A. I got that understanding from talking with Mr. Michael Sansone.

Q. Is that in this affidavit here you prepared?

A. No, sir, it is not.

Q. All right, sir, now let's go to Phoenix, Arizona. You [fol. 119] went there in May of 1960, is that correct?

A. That is correct, sir.

Q. What was your purpose in going?

A. My purpose in going there was to conduct an investigation of the joint income tax liability of Mr. and Mrs. Sansone.

Q. For what year?

A. For the years 1956, 1957 and 1958.

Q. Let me ask you some general questions.

While you were there did Mr. and Mrs. Sansone produce all the documents that you asked for?

A. Yes, sir, they did.

Q. Did they make their dining room available to you to work in?

A. Yes, sir, they did.

Q. Did they tell you that they didn't believe they needed a lawyer because they didn't feel they had done anything wrong?

A. They asked me whether they should have a lawyer and I told them it was up to them, I could not advise them.

Q. You were just going to conduct a fair and impartial examination, is that what you told them?

A. I told them it was my duty to get all the facts and I told them they were entitled to retain a lawyer if they wanted to, but I could not advise them whether they needed one or not, it was up to them and their decision.

[fol. 120] Q. Now, Mr. Conley, in connection with these two transactions, the sale of D-X and the sale of Gulf, did you find in your investigation any evidence that Mr. Sansone attempted to conceal any part of these transactions?

A. Outside of the fact that they weren't reported on the income tax return, I did not find any.

Q. In fact, it was a very open situation, was it not? The deeds bore his name, the mortgage bore his name, the revenue stamps from which you could look at the deed and tell what the actual cost of sale was, is that true?

A. That is correct except for the revenue stamps. The deeds that are on file at the recorder of deeds' office, the original purchase of the total tract and the first sale to D-X, the revenue stamps are not shown on the deed when it was recorded. On the Tremarco sale the documentary stamps are shown on the deed.

Q. You have sat here as a witness yesterday, didn't you?

A. Yes, sir.

Q. Didn't you hear the gentleman from the Land Title Company testify that the proper stamps were on the sale of the D-X deed?

A. You know, Mr. Wadden, sometimes those stamps are affixed after the deed was recorded and that was evidently what happened in this case.

[fol. 121] Q. Incidentally, did you ascertain what Mr. Sansone did with the checks he received in connection with D-X and in connection with Gulf?

A. Yes, sir, I did.

Q. All right, what did he do with them?

A. The check that he received on the D-X sale he deposited against an account at A. G. Edwards. That was a debt that he owed A. G. Edwards on his account down there. The other check was deposited in his bank account.

Q. So that certainly wouldn't be concealment, would it, Mr. Conley?

A. No, sir, I would say that was not concealment.

Q. I wonder if you would describe for his Honor and the jury the method by which you conducted this investigation in Phoenix during the days of May 3rd and May 4th?

A. Yes, sir, I made an appointment to see Mr. Sansone. I asked him whether he wanted to bring his records to the Phoenix office and he said it would be more convenient if we could look at them at his house. So I made an appointment and we called at his house about ten-thirty on the morning of May 3rd. We proceeded looking at the records and interviewing Mr. Sansone, or Mrs. Sansone, with regard to items that we did not understand in the records, or where the records did not show the nature of the transaction. That continued until approximately seven o'clock that night.

[fol. 122] Q. Let me get this straight: Ten-thirty until seven o'clock?

A. With a break for dinner of an hour or hour and fifteen minutes.

Q. Do you call dinner lunch or dinner supper?

A. I'm speaking about a break from—for a noon luncheon, if you will.

Q. Right. All right, sir. Just describe generally how long you were there at their home on May 4th.

A. On May 4th I believe that it was approximately nine o'clock in the morning to approximately six o'clock that night.

Q. Did you have a break for dinner?

A. Yes, sir, I'm sure we did.

Q. During the period of time you were there did you have an opportunity to examine Mr. and Mrs. Sansone's checks for the years '56, '57 and '58?

A. Yes, sir, I did.

Q. Did you have an opportunity to examine the bank statements for the years '56, '57, '58?

A. Yes, sir, I did.

Q. What else did you examine in the process of this investigation at their home?

A. I recall looking at Mr. Sansone's copies of the docu-

[fol. 123] ments relating to this real estate in question, a stock certificate of a corporation in which he holds stock, and I believe a small corporation that he owns, he had a record book concerning that that we looked at.

Mr. Wadden: Excuse me one minute, your Honor.

(A document was marked for identification as Defendant's Exhibit 3.)

By Mr. Wadden:

Q. During your investigation in Phoenix on May 3rd and 4th, Mr. Conley, I'm going to show you Defendant's Exhibit 3 for identification, and ask if you had occasion to see that? First of all, I'll ask you if you can identify it?

A. Yes, sir, I can identify it.

Q. What do you identify it as, sir?

A. This is a sketch of the property in question, which was prepared by Mr. Sansone and given to us.

Q. Prepared in your presence?

A. Yes, sir.

Q. That was prepared when he was discussing Fish Pot Creek?

A. Yes, sir, Fish Pot and the other real estate.

Mr. Wadden: Might I exhibit this to the jury while we're continuing?

The Court: You're offering that?

Mr. Wadden: Yes. I'm sorry, I mean to offer it.

[fol. 124] (Which said Defendant's Exhibit 3 was received in evidence and was passed to the jury.)

The Court: Don't continue until they get through looking at it.

Mr. Wadden: Your Honor, I think counsel for the government has made a good suggestion, which is to inform the jury that that original they are now looking at was the original from which this exhibit was blown up.

The Court: Very well.

(A document was marked for identification as Defendant's Exhibit 4.)

By Mr. Wadden:

Q. Mr. Conley, this affidavit that you identified, which government counsel has read, doesn't purport by any means

to cover the discussions you had on two days, on May 3rd and May 4th, does it?

A. That covers only the main tract in question, the main point in issue.

Q. The main thing you were interested in?

A. The main point in issue.

Q. I say the main point you were interested in?

A. Well, that's true too.

Q. Yes, sir. Now, during this two days of questions and answers, and examination, I believe you testified that you took notes, is that correct?

[fol. 125] A. Yes, sir.

Q. What would you do? Ask Mrs. Sansone a question and then write the answer down she gave?

A. Most of the time our procedure was this: We were looking at records. If we would see a deposit that would say that the money was from so and so, then we would ask Mr. Sansone if he was there, or Mrs. Sansone what was this transaction, who is this person, and they would tell us, and then I would make a note of that.

Q. You mean you would put down in your own handwriting what you interpreted that they were telling you, is that what you're saying?

A. I wrote in shorthand the essentials of what they told me.

Q. Well, you made the determination of what you thought was material and what you thought was immaterial that they were telling you, isn't that correct?

A. Yes, sir, I couldn't possibly get it all down. I'm not a shorthand reporter.

Q. All right, sir. Now, during your interview didn't the question of Fish Pot Creek come up with Mr. Sansone?

A. Yes, sir, I recall some discussion of the creek.

Q. Didn't Mr. Sansone tell you that he had quite a problem on this land because of Fish Pot Creek?

[fol. 126] A. I don't remember that he phrased it in just that way.

Q. He's the one that actually drew in Fish Pot Creek on that map, is he not?

A. Yes, sir, that is correct.

Q. And didn't he draw it in while he was explaining to you about the nature and the location of the property?

A. Yes, sir, he did.

Q. What did he tell you about Fish Pot Creek? You tell me in your words what he said.

A. What he told me was that the—that he had no useful frontage on Manchester Road adjacent to Fish Pot Creek because the ground drops off at that point. He also told me that there was contemplated that the State Highway Commission would put in a new bridge and straighten out Fish Pot Creek and after that he would have more useful frontage on Manchester.

Q. That's the best you can remember, is that right?

A. That's all I remember, sir.

Q. You didn't think this conversation about Fish Pot Creek had anything to do with whether he owed taxes or not, did you?

A. Certainly Fish Pot Creek, that covers the whole tract there, we were discussing the whole tract and that is, of course, in there.

Q. I am now showing you Defendant's Exhibit No. 4 for [fol. 127] identification and ask you if you've ever seen that document before?

A. I don't know, Mr. Wadden, if I've seen this before or not.

Q. Is it possible that you saw it when you were talking to the Sansones?

A. I recall that Mr. Sansone had a sketch of this proposed construction and so on, but I believe that Mr. Purk looked at this more than I did.

Q. But it was there, wasn't it? This document, Defendant's Exhibit 4, was present in—

A. It may have been. I cannot say for sure.

Q. I thought you just said Mr. Purk looked at it more than you did.

A. I said that if that is the document that I had in mind that Mr. Sansone had there, that Mr. Purk looked at it more than I did, so I cannot say positively that that is the document that I looked at, or that that is the document that was present.

Q. All right, sir. What else do you remember that either Mr. or Mrs. Sansone told you about Fish Pot Creek?

A. I don't recall anything except what I've said.

Q. Mr. Conley, didn't Mr. Sansone tell you that he had received a number of complaints from the mayor of Ballwin [fol. 128] about the condition of Fish Pot Creek?

Mr. Martin: Objection, if the court please, as to that portion.

The Court: Be overruled. Cross-examination.

A. The only complaint that I remember Mr. Sansone mentioning was that he had received a complaint about some lumber being left on the tract of ground and that the City of Ballwin wanted him to remove the lumber. That is the only one I recall.

By Mr. Wadden:

Q. He didn't tell you anything about the live sewage that was flowing through Fish Pot Creek?

A. I don't recall any conversation along that line.

Q. This wouldn't have anything to do with taxes, would it, so you wouldn't recall it if he had said it, would you?

A. I would probably recall it if it was in my notes.

Q. Did he tell you about the children that had fallen into this creek?

A. No, sir, I don't remember any conversation about children falling in the creek.

Q. Did he tell you about trying to get a bulldozer in there and straightening the creek bed out and getting rid of the muck?

A. No, sir, I don't recall anything like that.

Q. So, of course, you don't recall the fact that he told you that the mayor of Ballwin had told Sansone that he [fol. 129] would have to straighten the creek conditions out after the State Highway had made their plans final?

A. I don't recall that, no, sir.

Q. You don't recall that at all?

A. No, sir.

Q. You don't recall that Mr. Sansone told you that he had an architect come out to the creek bed and give him an

estimate on the cost of straightening the creek out and that the architect gave him an estimate of not less than $40,000?

A. No, sir, I don't recall such a conversation.

Q. Well, did you make full notes on this, or is this another situation where it didn't seem important to you so you didn't put it in your notes?

Mr. Martin: Objection, if the court please.

The Court: Be sustained as argumentative.

By Mr. Wadden:

Q. Didn't Mr. Sansone show you correspondence from the Highway Commission in connection with this work that they had to do, or were going to do on Manchester, and also some work in this creek?

A. He may have. I don't recall specifically.

Q. Did Mr. and Mrs. Sansone tell you that they had gone to the Highway Commission all during the year off and on in 1956 to get information as to when the plans for Fish Pot Creek were going to be final by the Highway Commission? [fol. 130] A. I don't recall that conversation, no, sir.

(A document was marked for identification as Defendant's Exhibit 5.)

Mr. Wadden: May the record indicate, your Honor, I'm showing the witness Defendant's Exhibit 5 for identification.

By Mr. Wadden:

Q. I will ask you if you did not see that letter when you were in Mr. Sansone's home on May 3rd and May 4th, 1960?

A. I don't recall whether I've seen this before or not, Mr. Wadden.

Q. You wouldn't deny you had seen it, would you?

A. It's possible that I've seen it, I don't know for certain.

Q. Well, at least, there's no question in your mind that the issue of Fish Pot Creek was discussed on May 3rd and May 4th?

A. Yes, sir, there was some discussion of Fish Pot Creek.

Q. All right, sir. Did you intend to make a completely

accurate statement here in connection with Plaintiff's Exhibit N, a statement you say Mr. Sansone made?

A. Yes, sir, I did.

Q. You didn't mean to infer to the jury that these are Mr. Sansone's words in the statement, do you?

A. No, sir, I put it into words.

[fol. 131] Q. You talked for two days and then you sat down and you wrote out a statement for him to sign, didn't you?

A. That is correct, sir.

Q. And you say you attempted to make it as accurate as possible?

A. Yes, sir.

Q. Who determined what was going to go in this statement?

A. I did.

Q. He wasn't present when you wrote up this statement, was he?

A. He approved the draft of it. He had the opportunity of adding anything that he wanted to it.

Q. This statement was typed in the Federal Building in Phoenix, Arizona, wasn't it?

A. That is correct, sir.

Q. And it was typed by you, wasn't it?

A. Yes, sir.

Q. And Mr. Sansone wasn't present when you were typing it, was he?

A. No, sir, but he had been present before that, and had approved a rough draft of the statement.

Q. Where is the rough draft?

A. It is in the documents that have been turned over to you.

[fol. 132] Q. And it's your testimony that this statement, Government's N, was signed where?

A. It was signed at Mr. Sansone's house on the evening of May 5, 1960.

Q. Are you certain of that?

A. I am positive, sir.

Q. Do you remember having Mr. and Mrs. Sansone come down to the Federal Building about eleven o'clock on May the 5th?

A. No, sir, it was actually about four o'clock that they were down there, and I wrote out the rough drafts of the statement, which they approved. It is my recollection that they had to go somewhere or the office was closing, and they left and I made arrangements to take the final statement out to their house.

Q. Now, Mr. Witness, you have already testified on this subject, haven't you?

A. Yes, sir, I testified last night.

Q. Didn't you testify yesterday under oath, and didn't you testify again this morning in answer to a question by government counsel that the original rough draft, which you claim you have, was taken to their home the night of the 4th and they went over it?

Mr. Martin: Objection, if the court please, the record is the best evidence of what the witness previously testified. [fol. 133] He's asking the witness to pass on his own testimony.

Mr. Wadden: Well, your Honor, I certainly—

The Court: I'll let him answer, cross-examination.

A. Would you put that question again?

The Court: Read him the question.

(Whereupon, the reporter read the question.)

A. No, sir, I don't believe I testified to that. I testified that they approved a rough draft and I also testified yesterday that the final statement was signed at their home.

By Mr. Wadden:

Q. Yes, sir, but you testified yesterday, and you testified again this morning that this draft was taken to their home the night of the 4th?

A. No, sir, I don't recall testifying to that at all. That rough draft was approved at the Phoenix office, and I believe I testified to that last night.

Q. All right, sir. Now, in this particular statement, you say that Mr. Sansone told you the following in substance, because I can't quote him, because none of these words are his, are they?

A. It is not a direct quotation, no, sir.

Q. Well, now, you look at this exhibit and tell me whether it's a direct quotation or not. It starts out, "I, Michael C. Sansone," and it ends up, "I made this statement voluntarily." It would appear to be a verbatim statement by Mr. Sansone, isn't it?

[fol. 134] A. It's a statement which he has approved.

Q. Well, we'll get to that.

A. I did not put it in quotation marks.

Q. No, because you wanted it to appear that Mr. Sansone was making this statement, didn't you?

A. That is his statement. He has adopted that statement when he signs it.

Q. All right. You have in this statement, "During the current examination of our income tax returns several other smaller items have been brought to my attention that were not reflected in our joint income tax returns, such as a small item of approximately $375 profit in the operation of a 1956 joint venture selling Christmas trees, a rental payment for the use of a lot I controlled, and a lease commission. These omissions were not intentional and were the result of negligence and not intent to evade taxes."

Now, is this all he told you about this Christmas tree venture?

A. That is all that he wanted in the statement at that time.

Q. Did he tell you that he did not receive any cash profit from the Christmas tree venture, that he took his $375 in old equipment?

[fol. 135] A. No, sir, it's my understanding that this 375 was in cash.

Q. That was your understanding. Do you know who financed the—did you learn who financed the Christmas tree venture to begin with?

Mr. Martin: If the court please, I'll object to the query about the Christmas tree venture, that's not in issue in the case or not—

Mr. Wadden: Whether he got a truthful statement, your Honor.

The Court: Be overruled, this is cross-examination. It's referred to in the statement.

A. What was your question again, sir?

By Mr. Wadden:

Q. Do you know who originally financed the Christmas tree venture in 1956, in which Mr. Sansone then engaged?

A. I know that there was certain money borrowed. I think a hundred dollars came from Jake Baer, if I recall correctly.

Q. Mr. Sansone purchased the original equipment used to run the Christmas tree lots, didn't he?

A. Yes, sir, that's my understanding.

Q. And he was repaid, was he not, for his original cost?

A. Yes, sir; yes, sir, I understand he was.

Q. Now, the 375 that he was repaid was the cost of the [fol. 136] original equipment, was it not?

A. No, sir, he told me that that was a rough computation of what he thought was his profit on the Christmas trees.

Q. Didn't he tell you, Mr. Conley, that he had gotten the old equipment back and finally sold it for $50 a year later?

A. He told me that he got the old equipment back. I don't recall what he sold it for.

Q. So that this isn't a correct statement you have here about what Mr. Sansone told you about this Christmas tree venture in 1956, is it?

A. That doesn't cover the Christmas tree operation completely, no, sir.

Q. What you have done here isn't even correct, is it, Mr. Conley?

A. What I've done there is what Mr. Sansone approved. I attempted to—

Q. I didn't ask you whether he approved it, I asked you whether it's correct or not.

A. It's correct as far as it goes.

Q. It just don't go very far, does it? Now, why didn't you put in this statement something about the $1,900 in capital losses he had in 1958 which he did report?

Mr. Martin: I object, if the court please, the year of 1958 is not in issue.

[fol. 137] The Court: Be sustained.

Mr. Wadden: Your Honor, don't I have a right to show the bias and prejudice of this witness in connection with

making up this statement, because he shows that the man owes a little money, and then he completely fails to put down the fact that he did not report some $1,900 in capital losses?

The Court: Well, I think that's involved in another year that we're not involved with here.

Mr. Wadden: I'll withdraw it, your Honor.

The Court: I understand you're talking about '58?

Mr. Wadden: Yes, your Honor.

The Court: If you want to ask him about it, you can go ahead, with the jury understanding that it isn't the year in either Counts 1 or 2.

Mr. Wadden: I would rather try it in '56 and '57, Judge. I'll withdraw the question.

By Mr. Wadden:

Q. In connection with this statement, I believe you said that you examined the 1956, '57 and '58 checks of the Sansones, is that correct?

A. That's correct, sir.

Q. And their checks?

A. Yes, sir.

Q. Now, you have Sansone saying in this statement the following pertaining to 1957: "I did not report the 1957 [fol. 138] sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due."

Now, that's what you have him saying in this statement, is it not?

A. Yes, sir.

Q. Did you know at the time that you wrote this, that this is a completely false statement, the one I've just read you?

A. No, sir, I did not.

Q. You didn't know that?

A. No, sir.

Q. Didn't you just testify that you went over their books and their records and their bank account statements?

A. Yes, sir, I did.

Q. Well, did you learn, for instance, I have the May statement here, in May of 1958, did you learn that Mr. Sansone had $9,286.74 cash in the bank?

Mr. Martin: Objection, if the court please. That is completely after the year in question, after the filing of the return in question.

Mr. Wadden: The tax date, your Honor, is, of course, April 15th. He is sitting in 1960 talking about this man's state of mind in April and May, and at the very time he [fol. 139] has Mr. Sansone saying that he's under—

The Court: I'll let him answer it, because he says he examined the '56, '57, '58 checks, so he could tell you whether the thing showed that in May he had that money, or I mean whether he saw the record.

A. Certainly I saw the record.

By Mr. Wadden:

Q. You saw the record?

A. Yes, sir.

Q. Well, did you realize at the time that you wrote this statement, which pertains to Mr. Sansone's mind in early 1958, I gather, doesn't it?

A. Yes, sir.

Q. Did you realize that he had $9,286.74 in the bank within a period of two weeks of the time this statement purports to set forth Mr. Sansone's mind?

A. I observed the bank balance on various dates.

Q. I'm talking about this particular date.

A. I assumed that I saw that, because I looked at the bank statements.

Q. What were these financial obligations that you put in Mr. Sansone's statement?

Go right ahead and look at any of the records you have. I'm talking about financial obligations that he had, as of April and May of 1958.

A. If I may check a minute here?

[fol. 140] Mr. Wadden: Your Honor, if it would be all right for the court, might be a good time for Mr. Rosenblum to educate me while he's checking.

The Court: As soon as he answers this question.

Is it going to take you any time to check it?

The Witness: I would have to look at the copy of the report.

By Mr. Wadden:

Q. Pardon?

A. I would have to look at a copy of the report.

The Court: Announce a ten-minute recess.

(Whereupon, a short recess was taken, pursuant to which the trial proceeded as follows:)

By Mr. Wadden:

Q. Mr. Conley, at the time that you interviewed Mr. Sansone, prior to assigning this statement, did you tell Mr. Sansone that he would have an opportunity to explain his case to your superior in St. Louis?

A. I told him that he would have an opportunity for a conference with my superiors. I don't recall whether it was specifically stated at St. Louis or not.

Q. Well, you did tell him that he would have an opportunity to talk to your superior about this case, didn't you?

A. Yes, sir, I did.

Q. This was prior to assigning this statement of yours?

A. Yes, sir, it was.

[fol. 141] Q. Now, did Mr. Sansone tell you that he wanted to talk to your superior about this case?

A. I believe he did, sir.

Q. And did he tell you this at the same time he told you that this statement was incomplete and not correct?

A. No, sir, he did not tell me that.

Q. He never told you that?

A. No, sir.

Q. Did you afford Mr. Sansone this interview that you promised that he could have?

A. He was afforded an interview.

Q. Did you afford him an interview in St. Louis?

A. No, sir, but I can explain, if you will let me.

Q. You can explain to the government counsel if you want to.

The Court: I think he's entitled to make an explanation.
Mr. Wadden: Yes, your Honor.
Go right ahead and explain.

A. The explanation of why the interview was not held in St. Louis was this: In view of Mr. Sansone's residence in Phoenix and the fact he had given an explanation of these matters, I forwarded the report to our Omaha office with a recommendation that the case be reviewed as to its [fol. 142] substance before Mr. Sansone was afforded the contemplated conference. It was my intention that the case be returned to St. Louis for this conference in St. Louis. Instead of that, I learned from Mr. Sansone's letter that he had heard from the regional counsel. I immediately wrote then and requested that Mr. Sansone be afforded this conference.

By Mr. Wadden:

Q. But the conference you were talking about when you were talking in Phoenix on May 3rd, 4th and 5th, was a conference at St. Louis with your superior, wasn't it?
A. I don't recall whether it was specifically in St. Louis or not, no, sir.

Mr. Wadden: May the record indicate, your Honor, I'm now showing the Defendant's Exhibit No. 1 to Mr. Conley?

By Mr. Wadden:

Q. I ask you if you can identify that exhibit and if so, how you identify it and what you identify it as?
A. This is a letter that I wrote to Mr. Sansone on May 4th, 1961, in answer to a letter from him of May 1st, 1961.
Q. And in the May 1st letter he wrote you and said words to the effect, "Just what happened to the interview you promised me?" didn't he?
A. Yes, sir, he asked if there had been any change.
Q. Now, would you read the first sentence of your letter in answer to his letter asking what happened to the inter- [fol. 143] view you were going to give him?
A. "I thank you for your letter of May 1st, 1961, calling attention to the fact that the contemplated personal interview has not been afforded you."

Q. Then you were referring to the contemplated personal interview in St. Louis, weren't you?

A. I was referring to a contemplated personal interview. I don't know whether it was specifically St. Louis or not.

Q. Now, Mr. Conley, you testified that you interrogated Mrs. Sansone during this two-day period, is that correct?

A. We talked to her, yes.

Q. Was she present a great deal of the time while you were talking to Mr. Sansone?

A. Yes, sir, she was.

Q. Were there times, Mr. Conley, when you would be talking to Mr. Sansone and not getting answers that you thought were acceptable?

A. I don't recall that, Mr. Wadden.

Q. Did you ever turn to Mrs. Sansone in Mr. Sansone's presence and say, "Well, you know you're just as responsible on this return as your husband is? You signed it, and you've had a college education." Did you ever say that to her?

A. No, sir, I do not recall making any such statement.

Q. No statement like that?

[fol. 144] A. No, sir, I'm quite sure I did not.

Q. Did you discuss her college education with her?

A. Naturally, I asked her about her education.

Q. Was this in connection with her responsibility or liability on this 1956 and '57 return that you talked to her about her education?

A. Yes, sir, the—

Q. Did you tell her you thought she had ought to have known better than to sign this return?

A. I don't recall making that statement, no, sir.

Q. So far as you were concerned, Mrs. Sansone was under investigation, was she not?

A. Yes, sir, the joint liability of Mr. and Mrs. Sansone was under investigation.

Q. And you made quite clear to Mr. Sansone when you were there talking with him that his wife was in jeopardy, didn't you?

A. I don't believe I made any statement that his wife was in jeopardy.

Q. I didn't ask you if you made a statement as such, I asked if you made it clear to him, when you were talking to him, that his wife was in jeopardy?

A. I don't know how to answer that, sir.

Mr. Wadden: I have no further questions, Judge.

[fol. 145] Redirect examination.

By Mr. Martin:

Q. Mr. Conley, the items that you charged off as cost of the Gulf tract, such as the bill to Schurck, that is Schurck, for the lumber, I believe you said, and Kelly, those bills that counsel asked you about—

A. Yes, sir.

Q. —you charged those off as cost to the Gulf tract?

A. Yes, sir, I did.

Q. Now, sir, by charging those off as cost to the Gulf tract instead of cost to the whole tract, wouldn't that decrease the taxable liability of the defendant?

A. Yes, sir, it would.

Q. Now, Mr. Conley, Mr. Wadden asked you whether or not there were a number of ways of computing and allocating the cost of the different tracts, the D-X tract and the Gulf tract, when they were sold?

A. Yes, sir.

Q. And I think you mentioned that Mr. Purk computed the cost on a front footage basis?

A. That is correct, sir.

Q. Now, on the basis of allocating the cost on the front footage theory, wouldn't the tax liability be higher, using that formula, than on the assessed valuation formula that you have used?

[fol. 146] A. Yes, sir, it would.

Q. Would you tell us which formula would give the taxpayer the benefit of the lowest tax liability in computing the allocation of the cost of the various tracts sold?

A. I determined that the assessed valuation basis would give the lowest profit on the transactions.

Q. And giving him the lowest profit would give rise to the lowest tax liability in the various computations?

A. That is correct.

Q. And that is the one that you used?

A. Yes, sir, that is.

Mr. Martin: No further questions.

Recross examination.

By Mr. Wadden:

Q. Mr. Conley, did you just testify that you lowered Mr. Sansone's tax that was owed by apportioning or allocating all of these different costs to the Gulf sale?

A. Whatever—what I testified to was that the cost that I charged to the Gulf sale would lower his tax liability.

Q. Yes, but then you also testified if you had given it to him and put it in as regular business expenses and regular expenses, he would have had to pa more taxes?

A. I testified that with regard to the interest and taxes portion of the increased cost that if that had been added to [fol. 147] his itemized deductions it would have reduced the tax liability on that transaction by approximately $110.00.

Q. Yes, sir.

Would you indulge me one moment, your Honor?

Now, the government counsel, Mr. Martin, just asked you about two methods of allocation, one is front footage. and the other is what?

A. Assessed valuation.

Q. And you stated that assessed valuation was, of course, lower and cost the taxpayer less than the front footage, is that not right?

A. That's correct.

Q. Mr. Sansone paid his '56 and '57 taxes, he paid them on this higher allocation method, didn't he?

A. Yes, sir, the best of my knowledge the payment that was sent in was apparently based on a front footage basis.

Q. So as of now, he is due a refund on the very years in question, '56 and '57?

A. No, sir, he's not entitled to a refund. None of this tax has been assessed. The payment that he sent in is placed in what they call an unidentified account.

Q. You're not going to tell me, are you, Mr. Conley, that you're going to come in here for one theory for criminal prosecution and then when you get around to accepting the money he sent in, change it to another theory?

A. (No response.)

[fol. 148] Mr. Wadden: I don't have any more questions, Judge.

Mr. Martin: Just about two questions in light of that, your Honor.

Redirect examination.

By Mr. Martin:

Q. Mr. Conley, I think Mr. Wadden just mentioned about payment of taxes. Do you have any records of information pertaining to that?

Mr. Wadden: For the years '56 and '57, your Honor.

Mr. Martin: Yes, your Honor, my question is confined to '56 and '57, the years.

A. Yes, sir, on January 16, 1962, a letter was received from Mr. George A. Jenson, attorney at law, enclosing a check in the amount of $6,427.05, stated to be in payment of additional income taxes and the interest thereon owed by Michael C. and Helen M. Sansone for the years 1956 and 1957.

By Mr. Martin:

Q. Now, what date do you say that was sent in?

A. The date of the letter is January 16, 1962. It was received at the St. Louis office of the Internal Revenue Service on January 17, 1962.

Q. And when did this investigation begin, sir?

A. This investigation began in approximately August of 1960.

[fol. 149] Mr. Martin: No further questions, your Honor.

Recross examination.

By Mr. Wadden:

Q. Mr. Conley, when you explained allocation system, explained to Mr. Sansone that his way of figuring the tax that he owed in 1956 and '57 was wrong, you did this, didn't

you? You explained to him that he had not properly paid his taxes in 1956 and '57?

A. I had no further opportunity to talk to Mr. Sansone. I haven't talked to Mr. Sansone since I left Phoenix on May 5th, 1960.

Q. I'm talking about when you were in Phoenix in 1960. Didn't you explain to him that he had been improperly paying his taxes in '56 and '57?

Mr. Martin: Objection, if the court please. I don't think the question is clear when he uses the word "improperly paying."

Mr. Wadden: Excuse me, Counsel. Sorry.

Mr. Martin: I object to the form.

The Court: Be sustained. You can rephrase the question.

Mr. Wadden: Yes, Judge.

By Mr. Wadden:

Q. Did you and Mr. Purk have a conversation with Mr. Sansone in which you explained that he should have [fol. 150] allocated the cost of the land and the sales he had made?

A. Yes, sir.

Q. And didn't Mr. Sansone say that he wanted to pay the tax?

A. Yes, sir.

Q. On the '56 and '57, after you explained to him he was wrong?

A. Yes, he did.

Q. And didn't you tell him that there wasn't any need to pay the tax at that time because the investigation would go on, and in a period when he would be notified he could pay the taxes?

A. No, sir, I didn't tell him that.

Q. You didn't tell him that?

A. No, sir.

Q. Isn't it the practice of the Internal Revenue Service, in a criminal case involving delinquent taxes, to hope to go to trial with the taxpayer still owing the money?

Mr. Martin: Objection, if the court please.
The Court: Be sustained.
Mr. Wadden: I have no further questions, Judge.
Mr. Martin: No further questions, your Honor.
May this witness be excused?
The Court: You can stand aside.

(Witness excused.)

[fol. 151] The Court: Call your next witness.

(Documents were marked for identification as Plaintiff's Exhibits O and P.)

Mr. Martin: If the court please, by agreement with counsel the government offers into evidence a warranty deed which is marked as Plaintiff's Exhibit O, another warranty deed marked as Plaintiff's Exhibit P, and I would like to ask leave to explain to the jury what they are.
The Court: Very well.
Mr. Wadden: We have no objection to their admission, your Honor.
The Court: Very well.

(Which said Plaintiff's Exhibits O and P were received in evidence.)

Mr. Martin: Ladies and gentlemen of the jury, Plaintiff's Exhibit O is a warranty deed dated May 12, 1956, by and between Michael C. Sansone and Helen M. Sansone, husband and wife, to the D-X Sunray Oil Company, which deed was filed for record March 21, 1956, at 1:30 p.m., in the recorder's office in St. Louis County.
The Court: I don't want to quarrel with you, but you have misread some place. You couldn't file something before it's dated, I don't think.
Mr. Martin: The date of the deed is March 12, 1956, the date of the recording is March 21, 1956, at 1:30 p.m.
[fol. 152] Exhibit O does not bear or show on the recorded copy any revenue stamps.
Exhibit P is a general warranty deed dated the 12th day of August, 1957, by and between Michael C. Sansone and Helen M. Sansone, to the Tremarco Corporation, filed for

record August 12, 1957, at 12:30 p.m. It does bear copies of revenue stamps, and I think it's agreeable with counsel that these two deeds pertain to the two tracts in question.

Mr. Wadden: No question. I think we agreed, your Honor, that the fact that revenue stamps do not show up on the Gulf deed don't mean they weren't on there.

Mr. Martin: The D-X doesn't show the revenue stamps, the Gulf deed does show the revenue stamps.

Mr. Wadden: That's correct.

Mr. Martin: Call Mr. Purk.

HENRY G. PURK, being produced, sworn and examined as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Martin:

Q. Will you state your name, please?

A. Henry G. Purk.

Q. What is your business or occupation, Mr. Purk?

A. Internal Revenue Agent, sir.

Q. How long have you been an internal revenue agent?

[fol. 153] A. Since May of '53.

Q. What are the duties of an internal revenue agent?

A. Primarily the conducting of audits of books and records pertaining to Federal income tax returns of corporations, filed by corporations, fiduciaries, individuals and partnerships.

Mr. Wadden: Your Honor, I'll stipulate this witness' qualifications. He's well known to Mr. Rosenblum.

The Court: Very well.

Mr. Martin: All right, thank you.

By Mr. Martin:

Q. Now, Mr. Purk, assuming that a resident of the state of Missouri, who, during the calendar year 1956, and on December 31, 1956, was married and elected to file a joint income tax return claiming exceptions for himself, his wife, two children and mother-in-law, and who was em-

ployed as a security salesman in the state of Missouri, and whose regular accounting period was on the basis of a calendar year and not a fiscal year, and further assume that such person and his wife had a joint adjusted gross income of $11,794.28, and further assuming that such person and his wife were entitled to and allowed by the provisions of the existing internal revenue statutes of the United States an itemized deduction of $2,280.91, and were entitled to file exemptions to the alleged $3,000, what would be the joint taxable income for such person and his wife?

A. It would be $6,513.37.

[fol. 154] Q. Now, if self-employment income was $693.09, what amount of income tax and self-employment tax would such person and his wife have owed and should have reported and paid for that year?

A. $1,373.73.

Q. Mr. Purk, further assuming that a resident of the state of Missouri, who, during the calendar year 1957, and on December 31, 1957, was married and elected to file a joint income tax return, claiming exceptions for himself, his wife, two children and mother-in-law, and who was employed as a security salesman in the state of Missouri, and whose regular accounting period was on the basis of a calendar year and not a fiscal year, and further assuming that such person and his wife had a joint adjusted gross income of $17,730.44, and further assuming that such person and his wife were entitled to and allowed by provisions of the existing internal revenue statutes of the United States an itemized deduction of $1,621.61, and were entitled to five exemptions totaling $3,000, what would be the joint taxable income for such person and his wife?

A. $13,108.83.

Q. Further assuming, if self-employed income was $1,559.82, what amount of income tax and self-employment tax would such person and his wife have owed and should have reported and paid for that year?

[fol. 155] A. $3,105.29.

Mr. Martin: No further questions, your Honor, from this witness.

Mr. Wadden: I have no questions, your Honor.
The Court: You can stand aside.

(Witness excused.)

The Court: Call your next witness.
Mr. Martin: If the court please, the government asks that the jury be allowed to view the exhibits and the government at this time closes its case after the jury has viewed the exhibits.
The Court: Very well, where are the exhibits?
C is the map?
Mr. Martin: Yes, your Honor.
The Court: This jumps from K to O—off the record.

(Whereupon, discussion was had off the record.)

The Court: I would suggest no more than there are that you just give them to the jury and spread them out among them and then let them work them around, and when they have seen them—

(Whereupon, exhibits were passed to the jury.)

Mr. Wadden: May we approach the bench?

(Whereupon, discussion was had off the record, in the presence but out of the hearing of the jury.)

[fol. 156] (Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

Defendant's Motion for Judgment of Acquittal

Mr. Rosenblum: Defendant will file a motion for judgment of acquittal on the basis that there's no evidence properly in this record showing the specific intent required of the defendant with respect to each of the counts involved in this indictment, and more specifically that the only evidence of any wrongful intent is contained in the defendant's statement, which is Plaintiff's Exhibit N. Such evidence is not properly in the record because of the lack of corroboration by substantial evidence as indicated in the Smith and Opper cases, decided by the United States Supreme Court, also on the grounds that Plaintiff's Exhibit

N is not properly in evidence because it was secured by fraud, trickery or deceit. Failing evidence of specific intent, the proof of unreported income of each of the years in question does not establish a prima facie case.

Defendant, therefore, moves for judgment of acquittal on both grounds, and with reference to 1956 points out that even under Plaintiff's Exhibit N, there is no evidence or wrongful intent even if the statement is properly admitted, because it is exculpatory of any specific wrongful intent and that under the government's own evidence the defendant thought that he could have recovered his entire cost, which at that time was $2,500 less than his cost, so that defendant moves specifically for judgment of acquittal [fol. 157] on both counts, and for the reason stated with respect especially to the 1956 count, Count 1, but the motion includes both counts.

The Court: Be overruled.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: You can let the record show, when they're through, that the attorneys can leave when they want to, that when the jury is through looking at the exhibits we would adjourn.

During the noon recess, ladies and gentlemen of the jury, do not discuss the case among yourselves, let anyone talk to you about it or talk to anyone about it, read anything in any publication or listen to any broadcast about it.

Announce a recess until two o'clock.

(Whereupon, court stood at recess until two o'clock p.m. of Tuesday, July 2, 1963.)

[fol. 158]

AFTERNOON SESSION, TUESDAY, JULY 2, 1963.

Pursuant to adjournment as aforesaid, at two o'clock p.m. of Tuesday, July 2, 1963, the court met present and presiding as before, and the trial continued as follows:

Mr. Rosenblum: May I approach the bench, your Honor?

(Whereupon, discussion was had off the record, in the presence but out of the hearing of the jury.)

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

The Court: Let the record show that the defendant objected also to the admission of his statement of May 5th, 1960, on the ground that there was insufficient substantiated evidence to corroborate same in accordance with the suggestions contained in the defendant's memorandum, which was given to me yesterday and that this objection also is overruled.

The record can show with respect to the motion that was given to me yesterday at the end of the day—a memorandum was given me—it's a matter the jury is not concerned with—

Mr. Rosenblum: That's all I was concerned with.

The Court: —and that it is overruled.

Mr. Rosenblum: That's correct.

The Court: Call your first witness.

Mr. Wadden: Does the government rest, your Honor?

The Court: That's what I understand.

Mr. Martin: Yes, your Honor.

[fol. 159] Mr. Wadden: Might I make a brief opening statement, your Honor?

(Whereupon, counsel for defendant made his opening statement to the jury as follows:)

OPENING STATEMENT BY MR. WADDEN

Mr. Wadden: May it please the court, gentlemen of the government, ladies and gentlemen of the jury, I would like to tell you at the outset whatever I say to you now is not evidence. It should not be considered by you in arriving at a verdict in this case.

The defendant at this time has an opportunity to tell you basically what they intend to prove from the witness stand by live witnesses and by such documents as his Honor lets into evidence.

We will produce witnesses and documents to establish the following facts during the rest of the day: First, we will show you briefly Mr. Sansone's limited education. We will then very briefly put on witnesses who will verify the

transactions to which the government has already put in evidence, that is, we have no disagreement with the government as to the purchase or the sales which have already been testified to here.

We will show, ladies and gentlemen, that in the winter of 1955, and the early winter of 1956, that Mr. Sansone inspected the property in question, and particularly the creek, and that he found no unusual conditions except that there was a meandering creek running through his property.

[fol. 160] We will establish also, ladies and gentlemen, that as early as late 1955, Mr. Sansone was made aware that the State Highway Commission contemplated enlarging Manchester Road, and simultaneously to do certain work on the creek, that is, that they intended to change the bed of the creek and make the channel.

We will show in 1955, and all through 1956, that the State Highway Commission did not formulate its final plans. Everything was always pending.

We will show, ladies and gentlemen, that in the summer of 1956, the situation as pertains to the creek had completely changed. We will establish that during the summer of 1956 a very terrible condition existed all along the creek area.

We will show by testimony from Mr. Sansone, and other witnesses who were present at the creek, that there developed a serious health problem in that live sewage was being thrown into this creek from other developments, and was coming down the creek, and that when there was a rain of any size whatsoever the creek would overflow and deposit this human waste along the banks.

We will establish also, without Mr. Sansone's permission, that one builder came in and actually put in a sluice box in the creek, and that this sluice box would pour out liquid human waste.

We expect to establish that children that play in this [fol. 161] creek area, wandering away from their back yards, fell in this filthy creek and had to be pulled out. We will show when there was dry water, there were cesspools where the stagnant water would just sit, with the

human waste in it, and that there was a terrible problem in connection with the odor, and there was a very bad problem in connection with mosquitoes breeding in the creek area.

We will establish by the mayor of Ballwin, that is, the mayor of Ballwin in 1956, Mr. George Vlasis, who will testify here today, that when this condition got bad, in the summer of 1956, he began to receive complaints from the people that lived all around the creek area, the newly developed homes that were around the creek area.

He will testify, ladies and gentlemen, that in the summer of 1956, and the fall of 1956, he had occasion, on many times, he had occasion to have conversations with Mr. Sansone about the complaints he was receiving, and in the late summer of 1956, and continuing again through several conversations into the fall of '56, the mayor told Mike Sansone that he would have to correct the conditions in the creek, that he could not allow this public health hazard to continue.

The evidence will show, ladies and gentlemen, that Mr. Sansone, and the mayor, both agreed that it was absolutely impractical for Mr. Sansone to attempt to do anything in the way of putting up reinforced concrete culverts bedded [fol. 162] in rock until he was able to ascertain from the State Highway Commission what their plans for the creek were.

We will show that during the summer of 1956 Mr. Sansone talked to Mr. Ed Bilhorn. Mr. Bilhorn, you will learn from the witness stand, is an engineer by trade. He owned the property across the street, across Manchester, this property in here (indicating). He will testify as to his conversations with Mr. Sansone when they discussed this joint problem they had of the sewerage flowing on through the culvert and flowing onto his property. He will also testify as to his inspection of the creek area on Sansone's land. He will testify as an engineer as to the recommendations or what he suggested was the only way Mr. Sansone would be able to correct the conditions permanently as he had been directed by the mayor of Ballwin.

We will produce, first, and I might say with the Judge's permission, out of order, Mr. Harms, an architect. Mr.

Harms will testify that Mr. Sansone came to him in the fall of 1956 and asked Mr. Harms to come out and look at the property and give him some estimate of the cost involved in correcting the conditions that Mr. Sansone had received so many complaints about.

Mr. Harms will testify that he was unable to give Mr. Sansone any definite information because at that time, in late 1956, neither of them were able to ascertain yet what the State Highway Commission was going to do on re-
[fol. 163] routing the creek channel, on widening it, on what grading they would have on the banks.

He will testify that he told Mr. Sansone he felt that the cost to correct the conditions during the six hundred feet the creek ran through Mr. Sansone's property was a minimum of forty to fifty thousand dollars.

Now, ladies and gentlemen, we will also establish that during the years of 1956 and 1957, Mr. Sansone made every reasonable effort to ascertain from the State Highway Commission what the final plans were going to be because until he learned the final plans he would not be able to have his architect and an engineer come in and tell him what had to be done, so he might proceed simultaneously with the state.

We expect to establish by the testimony, ladies and gentlemen, that in 1957, April, when Mr. Sansone filed his 1956 return, that it was his belief that he had, and a reasonable belief, that he had no profit to report on the original sale of the D-X property, for two basic reasons, he will testify: Largely, he believed in 1957, that he had no tax to pay, because he had spent 22,500 for the land, and he had only received $20,000 in return, and so he felt he didn't have any profit on the land. Likewise, in the year of April, 1957, he was fully aware that he was going to be forced by the City of Ballwin to make the repairs on the conditions in the creek which had been estimated at fifty thousand to forty thousand dollars minimum.

Mr. Sansone will state as pertains to 1958, when he filed
[fol. 164] his '57 return, that he felt he was unable to determine whether he had a profit or not. The State Highway Commission, we will show, all during '56 and '57 was saying, "We'll be ready in three months. We'll be ready in

another three months." So that he had a belief in '56 and '57 that at any time he would be called upon to commence the work on this property to the tune of forty some thousand dollars, and that so when he figured his '57 return in 1958, he knew quite well that he had a temporary gain of $25,500, but that he did not know what the work in the creek was going to cost him. In other words, he will testify, ladies and gentlemen, that if the work in the creek cost him $20,000, he would have then paid a capital gain of 4,500. If, on the other hand, the work had cost him $30.000, it was his belief that his base was 22,500, plus 3,000, which would be 52,500, and that in 1957 he had only received from the property $47,000, so he did not report the income, the temporary income, because in his mind he wouldn't know whether it was income or whether he had a profit, until he had made the change in the creek bed.

I think that pretty well summarizes, ladies and gentlemen, what we expect to establish from the witness stand. At the proper time I am sure that both the government and myself will ask you merely for a just verdict for both parties in this case.

Thank you very much.

[fol. 165] DEFENDANT'S CASE

(Whereupon, defendant to sustain the issues in his behalf, offered testimony, oral and documentary, and made admissions as follows:)

The Court: Call your first witness.

Mr. Wadden: Thank you, your Honor, Mr. Harms, please.

JOE G. HARMS, being produced, sworn and examined as a witness in behalf of the defendant, testified as follows:

Direct examination.

By Mr. Wadden:

Q. Mr. Harms, will you tell his Honor and the ladies and gentlemen of the jury what your occupation was in 1956?

A. I was an architect, sir, registered architect.

Q. What is your present occupation, sir?

A. I am a registered architect.

Q. How long have you been a registered architect Mr. Harms?

A. I've been registered in the State of Missouri since 1948, I think it is.

Q. What organizations or societies do you belong to in connection with your profession?

A. I am a member of the local chapter of American Institute of Architects.

[fol. 166] Q. Mr. Harms, do you know the defendant in this case, Mr. Sansone?

A. I do.

Q. Directing your attention, Mr. Harms, to the fall of 1956, would you state whether or not you had occasion to go to a piece of property owned by Mr. Sansone in Ballwin, Missouri?

A. I did.

Q. Could you first give us the best date you can remember?

A. It was late fall of 1956 when Mr. Sansone came to my office and asked me to go inspect a piece of property with him at Ballwin, Missouri.

Q. [redacted] Harms, we have an exhibit, which is a government exhibit, C. It represents certain property that Mr. Sansone owned in Ballwin, Missouri, in '56 and '57. Does this exhibit properly portray the land that you went to visit?

A. Yes, sir.

Q. When you went to visit the land, who, if anyone, went with you?

A. Just Mr. Sansone and myself.

Q. What was your purpose in going to look at this piece of land with Mr. Sansone?

A. Mr. Sansone asked me to take a look at this property. He stated that he had purchased it and he wanted to take [fol. 167] a—for me to take a look at it to see how he could develop it.

Q. Did he make in connection with your visit—did he make any request of you as pertains to the creek? Was there a discussion about the creek?

A. Yes, at the time we discussed the property, I said to him, "Mike, something is going to have to be done to

this creek," and he said at the time that the State Highway Department had planned to build a new bridge and reroute the creek.

Q. Yes, sir. Now, did he ask you to give him any estimate in connection with the creek?

A. He did.

Q. Would you describe what he asked you to do and what you did?

A. Mr. Sansone asked me what I thought his cost would be to try to develop this property in connection with either rerouting or fixing this creek in such a manner that the property would be usable on both sides. I told him at the time that in my opinion it would cost him a minimum of forty to fifty thousand dollars to build a retaining wall and to bridge part of the property so that both sides could be usable.

Q. Now, at the time that you made the estimate of forty or fifty thousand dollars, had you ascertained what in fact the State Highway Commission planned to do?

A. Couldn't. You couldn't tell. He gave me a sketch [fol. 168] which showed that the right of way, I recall, was about 300 feet, but, at the same time, he said this was only a sketch, and it was just a tentative thing put out by the Highway Department. As a matter of fact, he said that they had told him that the right of way line wouldn't extend that far.

Q. At that time were you able to learn anything about definitely where the Highway Department was going to put the bridge?

A. No, sir.

Q. Now, in connection with your inspection of this creek area, did you receive any document from Mr. Sansone?

A. I did.

Q. Do you have it with you, sir?

A. I do.

Q. Might I see it, please?

A. (Handing document.)

Q. I ask you, Mr. Harms, if you would examine the document marked Defendant's 4 for identification, and tell me if you can identify that document.

A. This is a sketch that was put out by the State Highway Department, Missouri State Highway Department, with respect to the rerouting of the creek and it shows a bridge sometime going under this highway, this new highway.

Mr. Wadden: I offer it in evidence, your Honor, but [fol. 169] let me show it to counsel first (handing document).

I offer the exhibit, your Honor.

The Court: Very well.

(Which said Defendant's Exhibit 4 was received in evidence.)

By Mr. Wadden:

Q. Mr. Harms, what is the date that this exhibit bears?

A. The exhibit bears the date here of January 2nd, 1956, which it says "Tentative letting date."

Q. Now, this exhibit, I believe you said, was shown to you in late 1956?

A. That's correct.

Q. And had any work been started that you could see either on the road or the creek by the state at that time?

A. No, sir, it had not.

Q. Mr. Harms, does the exhibit indicate the state's tentative plans were to change the channel of the creek?

A. It did, yes, sir.

Q. What conversation, if any, Mr. Harms, did you have with Mr. Sansone concerning the feasibility of his trying to fix the conditions up along this creek before the state came in with their final plans?

A. Well, I just told him it was most stupid thing he could attempt because he just didn't know what in the world [fol. 170] the state would do.

Q. Is it your testimony that you told Mr. Sansone in the fall of 1956, again predicated on the fact you didn't know exactly what the state was going to do, that you believed that it would cost forty to fifty thousand dollars to correct this creek condition?

A. Minimum, yes, sir.

Mr. Wadden: Your witness.

Cross examination.

By Mr. Martin:

Q. Mr. Harms, the exhibit that we have here, does that sort of portray accurately and correctly the situation as it existed back in 1956, that is the red portion showing the route of the creek? What effect would the route of that creek as shown on the exhibit have on the corner lot that is here in the brown?

A. I'm not qualified to answer that.

Q. Now, sir, the original idea that Mr. Sansone expressed to you when he asked you to go out there was to give him ideas on how to develop this whole area that is in the color portion?

A. The area which is marked "commercial" there, from there on.

Q. Now, sir, the yellow portion is marked "commercial."

A. I beg your pardon, it was from the—it was from the road on, the portion that is marked blue and the yellow, [fol. 171] right above it, on.

Q. That would be from Birchwood Drive on west?

A. That's right.

Q. And what kind of development did he have in mind, or express to you that he desired to make?

A. He wanted to develop it commercially.

Q. And in order to develop it commercially he wanted to change the route of the creek, is that right, sir?

A. No, sir, he did not want to change the route of the creek; it was the state's idea to change the route of the creek.

Q. Now, sir, during the course of your conversation with him, was it expressed that it would be advisable to change the route of the creek so as to give more commercial front footage higher on Manchester?

A. No, sir, when we talked to him—when I talked to him, he handed me this sketch, which showed definitely that the state had intended to reroute the creek and bridge it at another point, as shown in your picture.

Q. And that would be this part here that is marked "Proposed Relocated Channel, Fish Pot Creek"?

A. That's correct.

Q. As a matter of fact, that development is now going on by the state, isn't it, sir?

A. Yes, it is.

[fol. 172] Q. Now, this cost figure that you gave, did that include putting a culvert through under the road, Manchester Road?

A. No, that was the state's job to put the culvert through under the road.

Q. Now, the figure of forty to fifty thousand dollars, that you mentioned, what work did that include?

A. That included a retaining wall on both sides of the creek, plus a small amount of bridging so that he could use one side—so that he could use both sides.

Q. When you say "bridging" you mean bridging here in the yellow area (indicating), is that right?

A. That's right.

Q. Did the proposed development also include the corner lot over here to this side that's in the brown?

A. I can't testify to that. I'm not—I don't remember.

Q. I mean during the conversation and the development that you were discussing, did that also include anything over on this side?

Mr. Wadden: What is "this side", Counsel?

By Mr. Martin:

Q. On the east side of Birchwood Drive.

A. It probably did but I can't recall.

Q. Now, other than putting in a retaining wall for the creek area, what else was to be done for that forty to fifty thousand dollar estimate that you gave, sir?

[fol. 173] A. That was just to put in the retaining wall and to bridge a small portion of that creek.

Q. Did that contemplate changing the route of the creek so as to give more front footage on Manchester Road?

A. The state had proposed to reroute the creek as you see in that sketch, and we were going to follow the creek as it went back up there, we proposed to follow it in that direction, depending entirely on the watershed area and numerous engineering aspects of the thing.

Q. Maybe I'm not making myself clear, sir. As I view the diagram, the old route of Fish Pot Creek, as compared with the new route, or the proposed route, the old route would cut off quite a bit of front footage on Manchester. Isn't that right, sir?

A. I assume it would.

Q. Now, sir, in your estimate that was given, did you contemplate doing anything that would increase the commercial front footage on Manchester Road?

A. According to the sketch that the state—

Q. No, I'm talking about in the estimate that you gave, sir.

Mr. Wadden: Your Honor, he's stated four times that the state was doing this.

The Court: I don't want to argue with you, but I think [fol. 174] the witness can understand him, and in the court's opinion he's not answering the question. That's all he's asking him to do, and the answer really is yes or no.

A. Would you read—

The Court: He didn't ask him about the blueprint. He asked him about the forty or fifty thousand dollars, what it contemplated.

Mr. Wadden: Yes, sir, as I understand, he was now trying to get the witness to say they were going to do the work to get more front footage, and I'm saying that he testified four times that the state was the one that was determining where the channel would go, not Mr. Sansone.

The Court: Mr. Wadden, I understand that, but as I understand the witness, and what he has indicated, the plans that the state proposes to put the channel of that creek further west, is that right, Mr. Witness, from where it is there?

The Witness: Yes, sir; yes, sir.

The Court: And all he's asking him is that when they moved the channel further over west if they were going to develop that part on Manchester there. That's all he's asking him, if I understand what they're talking about.

Mr. Wadden: Your Honor—

The Court: In other words, at the present time, I mean when you were out there, Mr. Witness, the outlet under the

[fol. 175] road was over there close to the blue where those marks are in black?

The Witness: Yes, sir.

The Court: And they were proposing to move it further over?

The Witness: The state was.

The Court: To the west?

The Witness: Yes, sir.

The Court: And all, as I understand it, he's asking you is if in the plans of the forty to fifty thousand dollars that you were going to do anything about that, where that creek didn't go under it any more?

The Witness: Your Honor, may I explain it please, sir, in my way?

The Court: That's what he's trying to get you to do.

The Witness: All right, sir. On this print, this tentative sketch here, it shows a typical section of a channel change, which shows that the state, on the north side of the bridge, was going to slope those banks—

Mr. Mayer: You mean this area here right here (indicating)?

The Witness: May I go down and point it out to them?

The Court: Go down and point it out to them.

The Witness: The state was going to cut a new channel [fol. 176] through here and slope these banks this way for a small distance.

By Mr. Martin:

Q. Now, sir, on the blueprint that you have there, how far up into the yellow area would extend the work the state had proposed to do, sir?

A. According to the one I have here, it would be to the right-of-way line, which was eighty feet.

Q. Let me see if I understand. The right-of-way line, do you mean Manchester right-of-way line?

A. I mean when they speak of a right-of-way line, they speak of from the center of the road to their right-of-way line on your property, which was a distance shown in the sketch that I have here as eighty feet.

Q. In other words, from the center of the road to the north boundary line of Manchester Road would be eighty feet, is that what you're saying, sir?

A. No, sir, what I'm saying is from the center of Manchester to the state right-of-way line is approximately—is shown here as being eighty feet.

Mr. Mayer: You're going this way (indicating)?

The Witness: That's right.

The Court: Let me ask you a question. Are you familiar with this Exhibit C there?

The Witness: Yes, sir.

[fol. 177] The Court: I'm not familiar with it, but would eighty feet be where those broken lines are, south—

The Witness: Yes, sir, approximately where those broken lines are.

The Court: I mean isn't that the proposed right-of-way, both north and south?

Mr. Wadden: I think so.

The Witness: Approximately, yes.

By Mr. Martin:

Q. Now, how long would the retaining wall be that you propose to put in, sir—would it have been?

A. I would say probably four to five hundred feet, possibly longer. We couldn't tell at the time because we didn't know, again, what the state was going to do.

Q. Now, sir, can you tell me the distance from the edge of Manchester, as we show here, the bottom of the yellow, to the top of the yellow, can you tell me the distance across there the creek would run?

A. No, sir, I cannot.

Q. Did you measure that in computing the cost of installing the retaining wall?

A. I did not.

Q. At the time you were there, sir, did you find sewage being dumped into this creek?

A. No, sir, I did not.

[fol. 178] Q. Was any sewage passing through the creek at the time you were out there, sir?

A. If there was, I didn't notice any odors or I saw none.

Q. Are you very familiar with that creek, sir?

A. Fairly familiar. I have passed it numerous times.

Q. Are you familiar with the area and the extended portion of the creek as it goes on up—

A. No, sir, I'm not.

Q. How many times were you out there with Mr. Sansone?

A. Just this one time, as I recall.

Q. And that was in the fall of 1956?

A. The late fall of 1956, yes.

Q. Now, sir, the changes in the channel of the creek proposed by the state would change the yellow portion so that it would move farther west, isn't that correct, sir?

A. That's correct.

Q. And that would increase the commercial value of this yellow portion by giving it more front footage on Manchester, wouldn't it?

A. It should.

Mr. Martin: No further questions.

Mr. Wadden: I have no further questions, Judge.

The Court: You can stand aside.

(Witness excused.)

[fol. 179] The Court: Call your next witness.

Mr. Wadden: Mr. Sansone.

Michael C. Sansone, being produced, sworn and examined in his own behalf, testified as follows:

Direct examination.

By Mr. Wadden:

Q. Mr. Sansone, would you state your full name for the record and present address?

A. Michael C. Sansone, 62 West Vernon, Phoenix, Arizona.

Q. What is your present occupation, Mr. Sansone?

A. I have a small real estate office in Phoenix.

Q. Mr. Sansone, are you married and if so, would you describe your family?

A. I am married, and I have two children.

Q. Were you successful in completing four years of high school, Mr. Sansone?

A. No, sir.

Q. When did you leave high school, in what year?

A. I left high school in 1959.

Q. What age were you, sir?

A. I was eighteen years old.

Mr. Mayer: '59?

The Witness: '39, I'm sorry. 1939.

[fol. 180] Mr. Mayer: I thought he said '59.

Mr. Wadden: Thank you.

By Mr. Wadden:

Q. What was the employment you had, Mr. Sansone, during the period of 1939 to 1942?

A. I had worked in a flower shop and during that time I took a night welding course, and thereafter entered into a defense plant as a welder.

Q. Directing your attention to late 1942, did you have a change of occupation—or '43, I should say?

A. Yes, sir.

Q. What was your occupation during '43, '44, '45 and '46?

A. I was in the United States Army Air Corps.

Q. When were you released from active duty, sir?

A. In July, 1946.

Q. Mr. Sansone, when you returned to the states, where did you locate and go to live?

A. In St. Louis, Missouri.

Q. Incidentally, how long had you lived in St. Louis prior to moving to Phoenix?

A. Well, all my life, other than Service.

Q. When you came back from the Service, what business, if any, did you engage in, Mr. Sansone, during the years of 1946 to 1950?

A. Engaged in the fruit and vegetable business.

[fol. 181] Q. Would you tell us just a little bit about it, how big it was, and what your position was?

A. Well, we had a small fruit store we opened in 1946 and we would—of course, I would go to the market at six o'clock in the morning and we would keep our store open—

it was retail sales—until eleven o'clock at night, and be seven days a week, and my wife would—she and I would—we worked in that store until I was recalled in Service.

Q. Directing your attention to 1950, Mr. Sansone, would you state whether or not you attempted to get further education?

A. Yes, sir.

Q. Incidentally, sir, did you finally receive a high school diploma?

A. Yes, sir.

Q. When did you receive it?

A. I received my diploma while I was in Service. I had written to my high school and they sent me a diploma through the mail.

Q. Where did you go to school in 1956?

A. Went to School of Architecture at Washington University.

Q. When did you enter and how long did you remain there?

A. I entered in the—it would be in the spring of 1950, and I remained through the summer session.

[fol. 182] Q. Of 1950?

A. Yes, sir.

Q. Did you return in the fall of 1950?

A. No, sir.

Q. What did you do after you got out of summer school?

A. Well, during summer school the Korean War had broken out and I was in the Reserves, and I volunteered for duty with my old active unit, which was overseas at the time.

Q. Did you go on active duty, sir?

A. Yes, sir.

Q. How long were you overseas during the Korean War?

A. Thirty-one months.

Q. When you returned to the United States after the Korean War, where did you come back to live?

A. St. Louis, Missouri.

Q. Did you seek further education?

A. Yes, sir, at the School of Architecture, Washington University, under the GI Bill.

Q. How long did you remain in the School of Architecture at Washington University in 1953?

A. I didn't complete that term.

Q. Why was that?

A. Well, I couldn't, under the GI Bill I couldn't support my family, and I had to go to work.

[fol. 183] Q. Directing your attention to 1954, Mr. Sansone, where were you working?

A. A. G. Edwards & Sons.

Q. When did you go to work for A. G. Edwards & Sons?

A. February the 1st, 1954.

Q. Did you work at A. G. Edwards & Sons during the years '54, '55, '56 and '57?

A. Yes, sir.

Q. During the years of '54 through '56, would you describe what your duties generally were with the A. G. Edwards & Sons?

A. Well, I was a stocks and bonds salesman and they had a small real estate operation, and I worked part time in that.

Q. When you say "small", how many men were in it before you came?

A. There was just one gentleman beside myself.

Q. Would you give us your average income during the years from A. G. Edwards & Company for '54, '55 and '56?

A. I would estimate around 3,000, 3,200.

Q. Now, sir, during the period of time I have just described, what, if anything, did you do to supplement your income?

A. Oh, I sold—I tried to sell—I sold Christmas trees, and, oh, I made fruit baskets for a fruit store.

Q. During the period of time I have described, Mr. Sansone, what other activity, if any, did you engage in looking [fol. 184] towards furthering your financial condition?

A. Well, I felt that I wanted to—

Q. Just tell us the activity that you engaged in.

A. I was trying to find a piece of property that I could in some manner acquire and develop it, to try to build on. Of course, my desire was in architecture, but I felt that doing some building, particularly a commercial development if I could acquire some land, and I was always—

Q. Did you in fact find such a piece of property?

A. Yes, sir.

Mr. Wadden: Give the government a chance to object to this question, or several questions that I'm going to try to speed this up.

The Court: We don't need to do that, just go ahead and ask them. They can object to any question that you ask.

By Mr. Wadden:

Q. Did you hear the testimony yesterday, Mr. Sansone, concerning your purchase of the total property on the Exhibit C of the government for 22,500?

A. Yes, sir.

Q. Did you hear the testimony concerning your simultaneous sale of the D-X property for $20,000.00?

A. Yes, sir.

Q. Now, was that testimony accurate?

A. Yes, sir.

[fol. 185] Q. All right, sir. Mr. Sansone, when did you first actually, physically inspect the property on Government's C?

A. That was in the winter of 1955.

Q. What was the condition of the land at the time that you went on this inspection, around the creek?

A. Well, of course, the land was hard, it was cold, and it was intermittent frozen, the ground was frozen.

Q. What, if anything, unusual did you notice about the creek when you saw it in late 1955?

A. Nothing unusual other than being a meandering creek, through the property.

Q. Mr. Sansone, in connection with your sale to the D-X people, had you had occasion to make inquiries of the State Highway Commission in connection the general location of this land?

A. Yes, sir.

Q. When was this query made, sir?

A. That was late '55 or very early '56.

Q. What information, Mr. Sansone, if any, did you learn as pertains to Manchester Road?

A. That the state was going to widen the highway, and particularly my property, they had a tentative plan for relocating the bridge, and that they were going to take a portion of the land for a right-of-way, and that they were—that a part of the creek would be straightened and that's [fol. 186] about what they did.

Q. Now, sir, directing your attention to the warm months, the summer of 1956, what was the condition of the creek and the property around the creek during the warm months of 1956?

A. Well, the rain that came in the spring, anyway would flood the creek and would flood over the banks, and with the creek receding, why, we would be left with muck holes, and there would be—from raw sewage there would be collections on the brush, and the brushes and the rocks that were there would—well, have a black substance on it. The odor would be very—very bad. It was just a mess.

Q. Did you receive any complaints in connection with the condition of the creek bed and the adjacent lands during 1956?

A. Yes, sir.

Q. Who, if anyone in particular, did you receive complaints from?

A. Mr. George Vlasis, the mayor of Ballwin.

Q. He was the mayor of Ballwin during 1956?

A. Yes, sir.

Q. How many times during the warm months of 1956 did you receive complaints from Mr. Vlasis about your creek?

A. Ten, twelve, possibly a few more.

Q. What were the nature of these complaints?

A. Well, they were complaints, particularly the odor, [fol. 187] the mosquitoes that were in the muck holes, the children playing in the area, the—well, just complaints about the unhealthy conditions that existed in the creek.

Q. During the summer of 1956, and the fall of '56, what conversations, if any, did you have with Mr. Vlasis about whose responsibility it was to be to fix this creek up?

Mr. Martin: Objection, if the court please, this being hearsay completely. Also calls for some legal opinion.

The Court: Be sustained as to the hearsay part.

Mr. Wadden: Your Honor, this is offered not for the truth or falsity of the matters contained therein, but the fact it was said. We're dealing with a man's state of mind.

The Court: You indicated you've got your other man here to tell them what he told you.

Mr. Wadden: Well, I'll have the same objection from the government then, we'll have the man here and he will testify.

The Court: Why don't we wait until we get to that?

Mr. Wadden: All right, your Honor.

By Mr. Wadden:

Q. As a result of the conversation with Mr. Vlasis during the late summer and fall of 1956, what, if anything, did you do as pertains to this creek?

A. We discussed the—I didn't quite—I'm sorry, Mr. Wadden.

Q. Do you know Mr. Harms?

[fol. 188] A. Yes, sir.

Q. Under what circumstances—would you state whether or not Mr. Harms inspected your property after you had conversations with Mr. Vlasis?

A. Yes, sir.

Q. Was that inspection as a result of the conversation you had with Mr. Vlasis?

A. Yes, sir.

Q. Did you hear Mr. Harms testify here today?

A. Yes, sir.

Q. Was his testimony correct?

A. Yes, sir.

Q. Now, sir, during the year of 1956, can you tell his Honor and the ladies and gentlemen of the jury on how many occasions, if any, you made efforts to ascertain from the Highway Commission what their plans were in connection with the Manchester Road and the creek?

A. Oh, I would say fifteen to twenty times.

Q. During the year of 1956 would you tell us whether or not you were able to ever ascertain the final plans of the Highway Commission?

A. Not at all.

Q. Did you personally visit the Highway State Road Commission?

[fol. 189] A. Yes, sir.

Q. Did you see the project engineer in connection with this—

A. I did.

Q. What was his name, sir?

A. The project engineer was Mr. William Broderick.

Q. Mr. Sansone, you received $20,000 for the piece, D-X piece, in 1956, did you not?

A. Yes, sir.

Q. When was your 1956 return prepared?

A. It was the last day, without being late, in April of 1957.

Q. Now, you did not report this $20,000 in your return, did you, sir?

A. No, sir.

Q. Will you tell us in your own words exactly why you did not report the $20,000 sale of the D-X property in your '56 return?

A. Well, I felt that I had to—that I had paid 22,500 for the property, I had received $20,000 for a sale of a part of that property, I had an expenditure that I was being—that I had to expend to correct that creek, and I was told by persons, or Mr. Harms, that it would be a minimum of forty to fifty thousand dollars. Now, $22,500 cost of the [fol. 190] property, plus an additional 40,000, 50,000, I didn't know just what amount it would be, I felt that I had not recovered my cost on the sale of the $20,000; therefore, I did not report it.

Q. Let me retrace a little bit, Mr. Sansone.

Do you know a gentleman by the name of Ed Bilhorn?

A. Yes, sir.

Q. Would you state whether or not in 1956 he owned any property that was near yours?

A. Yes, sir.

Q. Would you step down and show us on the chart where Mr. Bilhorn's property was?

A. Mr. Bilhorn's property was the property that would be between new Ballwin Road and old Ballwin Road, that is about 1,520 feet, and it was starting at this point, and it was immediately across from the property that I owned there in color.

Q. Did it run along Manchester Road and across the road from you?

A. Yes, sir, immediately across the road from the property that I owned.

Q. All right, sir. Thank you, sir.

During the summer of 1956, did you have conversations with Mr. Bilhorn pertaining to this sewerage problem on your property?

A. Yes, sir.

[fol. 191] Q. Did you have conversations with him pertaining to a sewerage problem he had on his property?

A. Yes, sir.

Q. As a result of these conversations, did you learn what, if anything, Mr. Bilhorn was in the process of doing in 1956 as pertains to the property he had and the creek on his side of the road?

Mr. Martin: Objection, if the court please. It's immaterial as to what other property owners' problem was.

The Court: Be sustained.

Mr. Wadden: Would you hear me on that, Judge, if that's the basis of the ruling, because the same creek runs through his land as on Mr. Bilhorn's and they had a common problem together. That's why they had these conversations.

The Court: Well, you're asking about what he did on his. I don't think what he did over there would have anything to do with what happened over there.

Mr. Wadden: What I intend to bring out, Judge, he knew Mr. Bilhorn had already spent $30,000.

The Court: That doesn't make any difference if he had spent $350,000. That hasn't anything to do with him. That's on property that is across the road that isn't even here, we don't know what it looks like or anything about it, use of it. I'll sustain the objection. It's not the property in-

[fol. 192] volved here.

By Mr. Wadden:

Q. Did Mr. Bilhorn visit your property during 1956?

A. Yes, sir.

Q. Did he inspect your creek during 1956?

A. Yes, sir.

Q. All right, sir.

Now, directing your attention to the year of 1957, did you have further conversations with Mr. Vlasis during the warm months of '57 as pertains to the conditions on your creek?

A. Yes, sir.

Q. Did you receive the similar complaints that you received in 1956?

A. Yes, sir.

Q. Would you state whether or not you personally went on the property and inspected it in '57?

A. Yes, sir.

Q. Were the conditions worse or better than they had been in '56?

A. I would say they were worse.

Q. At the time you looked at this property in 1955, were there any structural—anything built in the creek?

A. Not in '55, no, sir.

Q. Well, would you tell us what you found when you pur-
[fol. 193] chased the property, or shortly thereafter, that had been built into your creek?

A. Well, they refer to it as a sluice box, a concrete sluice box.

Q. What is a sluice box?

A. Well, I understand it's a large concrete structure that—that goes into the creek bed, and also rises above the creek bed, and that the—I don't know how it accomplishes it, but raw human waste goes into the box and affluent comes out of the box, a liquid affluent that is liquid human—whatever it does, I don't know.

Q. Was this sluice box emptying into the creek during the year 1956?

A. Yes, sir.

Q. How about '57?

A. Yes, sir.

Q. Now, during the years of '56 and '57, as a result of the complaints you received, did you make any effort to temporarily alleviate conditions at the creek?

A. Yes, sir.

Q. Would you tell us just very briefly what you did?

A. Well, I hired a—or I got a contractor to remove some trees and try to get into that creek to get a defined

channel in there so that some of the—so that the creek could [fol. 194] flow off. I also had some—I had purchased some timbers to try to define the bank of the creek so that it wouldn't—when it overflowed it wouldn't flow over the portion you see there in yellow marked "Commercial".

Q. Were you successful in eliminating these conditions to any extent?

A. Not at all.

Q. During the year of 1957 how many times would you estimate that you were in contact with the State Highway Road Commission in connection with the work that was projected to be done in the creek and along Manchester Road?

A. At least fifteen times.

Q. Was Mr. Broderick still the project engineer at that time?

A. Yes, sir, he was.

Q. During the year of 1957, were you ever able to get any definite plan from the State Highway Commission as to what they were going to do with that creek?

A. No, sir.

Mr. Wadden: Judge, I don't want to transverse your ruling, I cannot ask him anything about conversations he had with Mr. Vlasis, who is here, and I don't see how the government can be hurt by my asking him a few questions.

The Court: I can't give you or anybody else any advance [fol. 195] ruling on any questions you ask. You can ask anything you want to, you or any other lawyer, and if they object to it then I'll rule on it.

Mr. Wadden: All right, Judge. Thank you, sir.

The Court: I can't tell you what they're going to object to. I don't know what they're going to do.

By Mr. Wadden:

Q. Mr. Sansone, directing your attention to the conversations you had with Mr. Vlasis, in which there was a discussion of whose responsibility it was to fix the creek up, did you have such conversations?

A. Yes, sir.

Q. Would you state whether or not Mr. Vlasis agreed that you would not have the responsibility to fix the creek until after such time as the State Highway Commission had come in with their final plans?

A. Yes, sir.

Q. Now, directing your attention to the return of 1957, when was it prepared, sir?

A. In—near the last day that it would have—you know, that it was due, in April of '58.

Q. As of April, 1958, you had received $47,000, including D-X and Gulf, and you paid out 22,500, is that correct, sir?

A. That's right.

Q. So at the time you had 24,500 over your original pur-
[fol. 196] chase price, is that correct?

A. Yes, sir.

Q. Did you report the sale of the Gulf property or the sale of the D-X property in 1958, that is, your '57 return?

A. No, sir.

Q. Would you explain why you did not report these two sales as of April, 1958?

A. The—the—the forty to fifty thousand dollars that I was having to spend in there, that I was told that I would have to correct that creek, I felt was an additional cost. I didn't know just how soon that cost would be, but the state kept advising me that it was going to be very shortly, and now, the forty to fifty to sixty thousand dollars, plus the $22,000, I felt was my cost, because that 40,000 minimum was a real cost to me and that I honestly believe that I didn't have to report those sales until I recovered my entire cost.

Q. What would you have done if the cost had been estimated at $20,000?

A. Well, if my cost had been estimated at 20,000—

Q. That is, the cost of fixing the creek.

A. If it had been estimated?

Q. Yes, at 20,000.

A. You mean a minimum of 20,000?

Q. No, as $20,000 flat.

[fol. 197] Mr. Martin: Objection, if the court please.

The Court: Be sustained.

By Mr. Wadden:

Q. Mr. Sansone, do you remember Mr. Conley's visit and Mr. Purk's visit, back there, to you in Phoenix, Arizona?

A. Yes, sir.

Q. Do you remember on what date they came to see you?

A. It was on May the 3rd, 1960.

Q. Was Mr. Conley right when he testified he was at your house from about ten-thirty until seven the first day?

A. I believe it was earlier when he got there, but I might be mistaken, but he was there that long, at least.

Q. What conversation, if any, did you have with Mr. Conley sitting there beside Mr. Martin about the liabilities you had in connection with this creek?

A. I explained to Mr. Conley the required—the fact that I had to spend $40,000, that that was a cost that was imminent to me, and I told him that—well, I told him completely about the creek, about the conditions of the creek, the complaints. I told him the whole story.

Q. Did you explain to him as you explained to this jury why it was you didn't make a report of the '57 and '56 sale of property?

A. Yes, sir.

[fol. 198] Q. Did Mr. Conley take notes while you were making this explanation?

A. Just for a small part of the time. I mean he didn't take notes continuously, but he would ask a question or I would start explaining, and then—but a very small part of the time that he would take notes on it.

Q. How many times did the subject of Fish Pot Creek and your potential liability, your pending liability, come up between you and Mr. Conley and Mr. Purk, or was Mr. Purk conducting the examination?

A. Mr. Purk wasn't conducting the examination.

Q. Well, between you and Mr. Conley.

A. Three, four, maybe five times.

Q. Was anyone else present in the house besides you and Mr. Conley?

A. Yes, Mr. Purk and my wife.

Q. This interview went on for two days, is that right?

A. That's right.

Q. Would you tell us, sir, how you happened to draw Defendant's Exhibit 3—

Your Honor, I'm not sure whether I offered this or not. I think I did, sir.

Mr. Mayer: I think it was offered.

The Court: It's been offered.

[fol. 199] By Mr. Wadden:

Q. —how you happened to draw this Defendant's Exhibit 3 with this creek inserted on it?

A. Well, to explain to them the—what I have said here, about the complaints that I had received, what it would be required to fix it, about the State Highway and their not giving me definite plans, and that I had a minimum of $40,000 expenditures to be spent on that land.

The Court: Let me see that.

Mr. Wadden: Yes, your Honor.

The Court: You go ahead.

Mr. Wadden: All right, sir.

By Mr. Wadden:

Q. Mr. Sansone, I'm now showing you Government's Exhibit N, which is in evidence, and which is an affidavit purported to be you speaking. Let me ask you, sir, where this affidavit was actually signed?

A. That was signed in the Federal Building in Phoenix, Arizona.

Q. Who was present when it was signed, if anyone?

A. Mr. Purk, Mr. Conley, and my wife.

Q. Do you remember the room you were in when you signed it? Describe it.

A. The room was on the order of a conference room and it had a wooden table about the size of the table there (indicating), and it had a chair at one end and two or three [fol. 200] chairs on each side.

Q. Now, I would like to ask you a couple of questions as pertains to this statement of Mr. Conley's. Did you ever make any statement to Mr. Conley, whether it was in these

words or the substance of it, but did you ever make any similar statement to Mr. Conley while he was in Phoenix as the one I am going to read to you:

"I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due."

Did you ever make any statement like that to Mr. Conley?

A. No, sir.

Q. What was your financial condition in April and May of 1958?

A. It was better than it had ever been before in my life.

Q. Had you, in fact, lent people money?

A. Yes, sir.

Q. During late 1957?

A. Yes, sir.

Q. I believe as of May 5th, 1958, did you have a balance in your personal checking account of $9,286.74?

A. Yes, sir.

[fol. 201] Q. Did you make a statement to Mr. Conley that has any resemblance to the one I'm going to read you now:

"I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so."

Did you make any statement like that to him?

A. No, sir.

Q. Well, Mr. Sansone, why did you sign this particular statement—

Strike that, Judge, if you will, please, sir.

You heard the testimony that Mr. Conley prepared this statement, using "I, Michael Sansone," and putting it in the first person, did you not?

A. Yes, sir.

Q. You heard Mr. Conley testify that he brought a rough draft, so that you saw a rough draft of this statement. Did you hear him testify to that?

A. Yes, sir.

Q. Did you ever see any rough draft of this statement that I'm holding in my hand, Government's Exhibit N?

A. I did not.

Q. When is the first time you saw this statement?

[fol. 202] A. On May 5th, 1960, when I was at that table, and he handed me that statement.

Q. At the time he handed you the statement, did you read it?

A. Yes, sir.

Q. What conversation, if any, did you have with Mr. Conley here after he handed you the statement and you read it?

A. I read the statement, I told Mr. Conley that the statement wasn't complete, it didn't reflect the things that I had told them the two days prior, that there were inaccuracies in it, there were words out of context.

Q. What did Mr. Conley say to you about that, if anything?

A. He said, "Are you going to sign it or aren't you going to sign it?" He said, "You get an opportunity to explain it," that this is a procedure, and it's—that's about what he told me.

Q. What, if anything, did Mr. Conley say to you about your having an opportunity to explain this statement to his superiors?

A. Mr. Conley told me I would get the opportunity to explain it to his immediate superior in his office in St. Louis prior to any decision or any action about this report.

Q. Did you want to explain it to his superiors?

A. I certainly did.

Q. Did Mr. Conley afford you this interview in St. Louis?

[fol. 203] A. He did not.

Q. During Mr. Conley's visit, Mr. Sansone, was it made known to you that your wife Helen was also the subject of Mr. Conley's investigation?

A. Yes, sir.

Q. How was it made known to you that she was the subject of his investigation?

A. Well, in particular when he would be asking me a question, and I would give him an answer and he would rephrase it, and then he would say, "Well"—"Well, maybe your wife can answer this better, she has a college education," or he would say that she signed this—our joint returns, or she prepared the sheets, the work sheets that the returns were made from. He made me well aware that my wife was responsible also.

Q. Were you fearful, sir, at the time that Mr. Conley gave you this statement to sign that he might include your wife in any criminal action?

A. I certainly was.

Q. Now, the last couple questions.

Mr. Conley and Mr. Purk informed you that it was their belief that you owed taxes for the years '56 and '57 on the sales in question, is that not true?

A. Yes, sir.

Q. What, if anything, did you say to Mr. Conley about [fol. 204] your desire to make immediate payment?

A. Well, I told him that if they could tell me what the procedure would be I would like to pay this just as quickly as I could.

Q. What did Mr. Conley tell you about that?

A. He told me that "don't do anything until you hear from us."

Q. Did you ever hear from him?

A. No, sir.

Q. Now, you paid your '56 and '57 taxes in early 1962, did you not, sir?

A. Yes, sir.

Q. When were you indicted?

A. I believe it was—

Q. Latter part of '62.

Mr. Martin: I'll object, if the court please, the record will show that.

The Court: The record shows.

Mr. Wadden: Would you stipulate when he was indicted, Counsel?

Mr. Martin: Whatever the record shows the date to be. I don't know.

The Court: Shows January 30, 1963.

Mr. Wadden: 1963, Judge?

[fol. 205] The Court: That's right.

Mr. Wadden: Thank you, your Honor.

I have no more questions, your Honor.

Might we have a short recess?

The Court: Yes, it's time for that.

Announce a ten-minute recess.

(Whereupon, a short recess was taken, pursuant to which the trial proceeded as follows:)

The Court: You may proceed.

Mr. Wadden: I have concluded, your Honor.

Cross examination.

By Mr. Martin:

Q. Mr. Sansone, how do you pronounce your name, Sansone or Sansonie?

A. Sansone.

Q. Mr. Sansone, I have here one copy of the Defendant's Exhibit 4, which is the blueprint of the—is this from the Highway Department or what department is that from?

A. That's from the Missouri State Highway Department.

Q. When was the first time you saw either that blueprint or one just like it, or a copy of that?

A. It was late winter of '55 or very early '56.

Q. How early in '56 would you say would be the last date possible for you having seen this exhibit?

[fol. 206] A. Oh, I would say shortly after New Year's.

Q. Then, sir, that was before you purchased this tract, wasn't it, sir?

A. Yes, sir.

Q. So at the time you purchased it, you knew that the Highway Department proposed to reroute the channel of the creek, didn't you, sir?

A. I didn't know that they were going to, just precisely what they were going to do.

Q. But you knew that they had these plans which you have introduced in evidence as Defendant's Exhibit 4?

A. They told me they were tentative plans, proposals, yes, it wasn't—

Q. Yes, sir, you had the information contained in this blueprint before you bought the property?

A. That's correct.

Q. Even before you took the option on it, you had that information, didn't you, sir?

A I don't recall if I had gotten it before the option, but it's possible.

Q. But you did have it before you exercised that option and signed the contract to buy it?

A. Yes, sir.

Q. So at the time you bought it you bought it with the [fol. 207] expectation of the creek being rerouted according to the Highway Department plans?

A. I bought it knowingly that they were proposing to do something, yes, sir.

Q. And you had in mind your possible development of the area in light of that rerouting the creek, didn't you, sir?

A. Well, I had—you asked me—you have to break that down too, that I knew that they were going to change that, or didn't know that they were going to change it, but they were proposing to change it, and that—well, I knew it when I bought it, yes.

Q. Yes, sir, and you counted that in your plans for future use and development of the area at the time you purchased it?

A. Yes, sir.

Q. Now, sir, at the time you purchased it, where did the creek go after it got onto your property, off of your property, sir?

A. It went under the road and across to the property across the road through Mr. Bilhorn's property.

Q. In other words, it didn't terminate on your property so that there was no outlet for it?

A. No, sir.

Q. Now, I think you stated that you did not report the [fol. 208] income from the sale of the properties because of the fact that you anticipated spending an additional amount to develop the creek area, is that right, sir?

A. I was certain that I was going to spend that money, yes, sir.

Q. So, sir, you knew that you had a capital gain that should have been reported one way or the other or some time or the other, didn't you, sir?

A. No, sir.

Q. You were familiar with the reporting of capital gains, weren't you?

A. Yes, sir.

Q. As a matter of fact, in your 1956 return, which is Plaintiff's Exhibit A, you did report some capital gains from sales of securities, didn't you, sir?

A. Yes, sir.

Q. Sir, at this time you had a real estate salesman's license, didn't you, sir?

A. Yes, sir.

Q. When did you get that real estate salesman's license?

A. I don't recall what year. It may have been '54, when I first started with Edwards, or '55.

A. And that was issued you by the State of Missouri?

A. Yes, sir.

[fol. 209] Q. And had you made any real estate sales, either as a salesman or personally?

A. Would you put that in a period of time, sir?

Q. Prior to the filing of your 1956 income tax return.

A. Yes, sir.

Q. In connection with those transactions did you have occasion to figure capital gains?

A. No, sir.

Q. Mr. Sansone, had you been active in any other development of commercial areas?

A. Until what time, sir?

Q. Prior to the filing of your 1956 income tax return?

A. You mean for my own—for myself personally?

Q. Well, either personally, or active in the development of it, sir.

A. For myself—I don't quite understand.

Q. Well, either—

A. I was a salesman, sir, and there were—I did make some sales as a salesman with Edwards. I don't know if you mean for myself or for clients.

Q. Well, both, sir. You had—can you tell us—

Mr. Wadden: Why don't we break the question down into two questions?

Mr. Martin: All right, your Honor, I'll rephrase the [fol. 210] question.

By Mr. Martin:

Q. As a representative of owners of real estate had you ever been active in the development of commercial areas or shopping centers?

A. I don't know what you mean by "active", sir. I did—

Q. Did you participate, sir?

A. You mean for myself? As a salesman, I talked to people, yes, I worked as a salesman. You want me to—well, go ahead.

Q. Were you active in developing a commercial area in the vicinity of Goodfellow and West Florissant?

A. Yes, sir.

Q. What year was that, sir?

A. Oh, 1955, '56, '57 and '58.

Q. Were you one of the developers of that area?

A. No, sir.

Q. What participation did you have in the development of that shopping center?

A. Well, I assisted in getting it rezoned from a residential to commercial, I, for—I talked to the company that finally went in there for—about a lease, I assisted in contacting the architect who designed the building. Well, just—that's all I can think of right now but—

Q. All right, sir. When you purchased the option to [fol. 211] buy this particular tract, did you have information that the D-X Oil Company wanted to repurchase this corner lot here, which is on the south—I mean the northeast corner of the intersection?

A. I believe it was shortly after I purchased the option.

Q. About how long afterwards, sir, did you learn that they would be interested in that particular location?

A. Oh, very shortly afterwards.

Q. Where did you get that information, sir?

A. Well, I knew that D-X Sunray Mid-Continental Oil Company was coming into the St. Louis area, I believe the information came through our office at A. G. Edwards & Company.

Q. Mr. Sansone, have you ever made any repairs in relation to this creek since you purchased that tract?

A. I attempted to.

Q. What repairs have you made, sir?

Mr. Wadden: Your Honor, I assume that he's talking about the years in this indictment?

By Mr. Martin:

Q. Yes, prior to the filing of your 1957 income tax return.

A. I had gotten a bulldozer in there, I had brought some lumber out there to try to do something with the creek, to define the banks.

Q. Now, sir, did the existence of the creek hamper your [fol. 212] sale of the portion that Gulf bought?

A. Yes, it did, but not to the extent that I didn't sell it.

Q. Now, sir, I call your attention to the lot just north of the Gulf tract, the existence of the creek and of the use of that portion of the tract.

A. At times when it was a heavy flood—

Q. In other words, would it flood all the way over from the creek to Birchwood Drive?

A. Well, just almost to it. I would have to explain that if you want it very clearly.

Q. All right, sir.

A. The land depressed from the edges of the street to the—toward the creek, and if the flood was heavy enough, depending on how much water there was, determined on how high it would come, but I don't think that it ever reached the streets but one time that I can recall. I mean into the streets, or over the edge of the curb.

Q. Would the yellow area west of the creek flood, sir?

A. Yes, sir.

Q. Has that been corrected?

A. You mean to date?

Q. Yes, sir.

A. Not to my knowledge.

[fol. 213] Q. Mr. Sansone, can you tell us just about how deep this creek is from the ground level down to the bottom of the creek?

A. As I explained to you it depresses from the perimeter or the boundary of the property, you'll have to give me from what point, I'll be happy to give you a figure.

Q. Well, from the west border line of the Gulf property.

A. That would be hard to determine exactly, but, now, I'll have to get that even a little more clear, because on the line—on the line the Gulf property has been filled, you see, so that I don't know if you mean—it's difficult to define a line.

Q. Maybe I'll ask you this question, sir, it will possibly make it clear. If you stand on the bank of the creek, how deep is the creek?

A. Well, there again the creek line was—there was no definite line of the bank of the creek. The bank would vary from, I just—it's almost impossible to give a figure standing on the bank unless you knew exactly where on the bank you were standing.

Q. You mean there is no boundary to the creek at all?

A. I mean you can't define the height of a bank when the bank meanders and it goes up and down, unless you know exactly where you are standing.

Q. Mr. Sansone, at the time Mr. Conley visited your [fol. 214] home in Phoenix, didn't he examine a number of records that you gave him?

A. He did a thorough job, yes, sir.

Q. And you gave him quite a few records?

A. I gave him all of my records.

Q. And that would be numerous ones?

A. Very many, yes, sir.

Q. Now, the most of the time that he spent at your home, wasn't he examining those records instead of asking you questions?

A. No, not Mr. Conley.

Q. Who examined the records, Mr. Conley or Mr. Purk?

A. They both examined them for the morning, the first day that I was there, but Mr. Purk particularly continued to examine records.

Q. And you worked there all day with them, did you, sir?

A. The first day, yes, sir, with the exception of just briefly leaving the room.

Q. Did you go to work that day?

A. I may have visited the office, but my office was about two and a half blocks from my home.

Q. Can you tell us about how long you were away?

A. Oh, I would guess at the maximum an hour.

Q. Now, the second day that they were there, were you at [fol. 215] home all day with them?

A. Yes, I believe I was. I don't recall leaving the second day.

Q. And were they there a third day?

A. Not at my home, no, sir.

Q. You saw them at the Federal Building on the third day?

A. Yes, s...

Q. How long were you down there, sir?

A. About twenty or twenty-five minutes.

Q. Sir, did you explain to them your plans for the rerouting of the creek, or the repairing of the creek?

Mr. Wadden: Well, your Honor, I would have to object to that because he's got a double base in there.

The Court: You can rephrase it.

By Mr. Martin:

Q. All right.

Did you discuss with them your plans for improvement of the creek area?

A. To the extent at such time I knew what the State was going to do, I discussed that with them.

Q. I think you mentioned something about a conference or interview that they indicated you could have.

A. Yes, sir.

Q. Did you ever have an interview up at Omaha?

[fol. 216] A. Yes, sir.

Q. And, specifically, sir, did you have an interview in the Federal Building in Omaha on June 2nd of 1961?

A. I had an interview. I don't know the exact date.

Q. Was that in the Federal Building in Omaha, Nebraska?

A. Yes, sir.

Q. Can you tell us approximately what date you recall it to have been, sir, as close as you can fix the date?

A. Well, that date would be reasonable. I'm not saying it wasn't that date. It sounds like it was that time.

Q. Do you recall who was present at the time, sir?

A. Three attorneys.

Q. Do you recall the names?

Q. Just a Mr. Conley. Not this Mr. Conley, but an attorney, Mr. Conley.

Q. Now, sir, I'll read you the name of the three attorneys and you tell me if you recognize any or all of these names: "Herbert J. Peterson, Manuel B. Silverburg, William C. Irwin."

Do you recognize any or all of those persons being present during the course of your interview at Omaha?

A. You read three names, didn't you, sir?

Q. Yes, sir, Herbert J. Peterson, Manuel B. Silverburg, William C. Irwin.

A. I don't remember any of those names. I remember [fol. 217] Mr. Conley.

Q. Was Mrs. Sansone present?

A. Yes, she was.

Q. How many interviews did you have in Omaha with the Internal Revenue Service representatives?

A. I had one.

Q. And that was in the regional counsel's office, sir?

A. I don't know if it was the regional counsel's office or not, but it was in an office.

Q. Now, sir, during the course of that interview did you mention anything about the difficulty you were having with the creek area?

A. I don't know if I got that far into the interview or not. I don't recall.

Q. How long did the interview last, sir?

A. Oh, I believe it was about thirty minutes.

Q. Are you sure it was not longer than thirty minutes, sir?

A. I can't recall, but it certainly wasn't much over thirty minutes.

Q. Do you recall approximately what time the interview began?

A. Oh, I'll place it at early afternoon.

Q. Are you sure it was not in the morning?

[fol. 218] A. It's possible.

Q. Is it possible that it might have started at ten a.m. in the morning?

A. Very possible.

Q. And terminated at 11:35 a.m.?

A. I don't think it was that long, sir, not nearly that long.

Q. Now, during the course of that interview you believe you said you did not tell them anything about the creek on the property?

A. I said I didn't recall getting that far into the interview.

Q. Was there any discussion at all about the creek on the property in that interview?

A. Possibly, I just don't recall.

Q. Did they ask you anything about why you did not report the two sales, one to D-X and the one to Gulf?

A. Yes, sir.

Q. And what explanation did you give them, sir?

A. I gave them the explanation that the property—I felt that I had not recovered my entire cost, that I had a liability or had an expenditure that I was being forced that I would have to put out, and that the two together, that I had not recovered my cost, therefore I didn't believe that [fol. 219] I owed any taxes.

Q. Did you tell them what that expenditure that you were being forced to put out was, sir?

A. I may have.

Q. Did you tell them how much that expenditure was?

A. Not exactly, but if I told them it would have been on the—no less than $40,000.

Q. Now, sir, if you made that $40,000 expenditure wouldn't that increase the value of the property that you retained title to?

A. It certainly would have, if the state had done what is indicated on that plat there, sir.

Q. Yes, sir, and that would be somewhat of capital improvement, wouldn't that be what you would term it, as a real estate man?

A. I really don't know the terminology for that, whether it's capital improvement or—or what other terminology it would be.

Q. Now, Mr. Sansone, I think you recall the interview that you had in the regional counsel's office in Omaha?

A. Yes, sir.

Q. Did you make a statement to the gentlemen who were present during the course of that interview that was in substance as follows—this is not quoting verbatim, but in [fol. 220] substance: That although you knew you had realized some gain on the sale of this land, you contended that you didn't have the money to pay the additional tax. Further, that you hoped to pay the tax in later years."

Did you tell them in substance that, sir—

A. No, sir.

Q. —during the course of that interview?

A. No, sir.

Q. Sir, did you also indicate that since you were doubtful as to the amount that would be realized from the sale of the entire parcel, you felt that until the entire amount was sold and the cost was recovered, you could not determine and need not report any gain? Did you tell them in substance that, sir?

A. Sir, I didn't follow you completely on that. I would like for you to read that again.

Mr. Martin: Will the reporter read it back?

(Whereupon, the reporter read the question.)

A. I could have.

By Mr. Martin:

Q. And, sir, during the course of that interview, did you report to the regional counsel's office all of the horrible things that you say Mr. Conley did while he was visiting you in Phoenix?

A. I don't recall.

[fol. 221] Q. Did you ever tell anyone connected with the Internal Revenue Service or the Treasury Department the things that Mr. Conley did while he was visiting you in Phoenix?

A. Yes, sir.

Q. Will you tell us when and to whom you made any report of that?

A. To the gentleman in Omaha.

Q. Can you give me his name, sir?

A. I don't know his name, except that one gentleman there was a Mr. Conley.

Q. Did Mr. Conley participate in the interview?

A. Yes, sir.

Q. That interview was more or less in response to the request that you say you made to Mr. Conley, isn't that right, sir?

A. That wasn't—would you just ask that again?

Q. All right, sir. I think there's a letter here which Mr. Conley wrote to you saying he was referring your matter to Omaha for purposes of the interview.

A. Yes, he wrote me a letter saying that.

Q. And that letter is dated May 4, 1961?

A. I'm not sure of the date, but—

Q. That's Defendant's Exhibit No. 1.

You recall this letter, sir?

[fol. 222] A. Yes, sir.

Q. So then after receiving that letter you had the interview on June 2, 1961?

A. Yes, sir.

Q. During the course of that interview in Omaha, sir, did you tell the regional counsel or anyone during the course of that interview that the affidavit, which is Plaintiff's Exhibit N, was not accurate?

A. Yes, sir.

Q. And will you tell us to whom you told that, sir?

A. To the three attorneys that were there at that meeting.

Q. Now, sir, will you tell us what is in this affidavit that is inaccurate?

A. You want small things, everything?

Q. Well, that pertains to the years of 1956 and '57 returns.

A. First of all, "I have today inspected and identified"—no, I'm sorry, that's not correct. I've gotten in the wrong spot here—that the deductions on my wife's—or on the work sheets, they call them work papers, that my wife prepared, were on the—the deductions were on the work sheet. That's one error. The date that I acquired the property.

Q. What is the date given in the affidavit?

[fol. 223] A. Sixteenth of March, 1956.

Q. What is the correct date?

A. I'm certain it's the 19th of March.

The statement here where it says, "I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and I did not feel I could raise the money to pay any tax due. I knew that I should have reported the 1957 sale," and there's a comma there, and the rest—you see, that's a sentence there, and it's broken by a comma there, there's two statements, one of them is true and one of them isn't. That portion I read.

Q. Tell us the one that is not true, sir.

A. "I knew that I should have reported the 1957 sale." There's another one in part, and I'll read the part—"and I intended to pay any additional taxes due when I was financially able to do so."

"Such as a small item of approximately $375 profit from the operation of a 1956 joint venture selling Christmas trees."

Q. Sir, when you say that is not true, it's the amount that is inaccurate or you had no—

A. Well, the amount and the fact that—well, you see, it's a long—it's a very, very—it's a long, long sentence there, it covers so many points. It's hard to take out a portion [fol. 224] of it that—I'll do my best.

Q. Well, now, on the Christmas tree item, I don't want to interrupt you, sir, but can we clarify that? On the Christmas tree item how much income did you have from that?

A. I didn't have any.

Q. Now, that item was not scheduled in your return and we are not complaining that that item should have been included, is that right, sir?

A. I'm sorry, I didn't—

Q. All right, I'll withdraw that.

Anything else that's not correct?

A. "I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief."

Q. Now, sir, did you read that before you signed it?

A. Yes, sir.

Q. And that sentence, last sentence or portion of the sentence that you have just read, was contained in the statement at the time you signed it, wasn't it, sir?

A. Yes, sir.

Q. If you don't find anything else, Mr. Sansone, I'll take it back.

I don't want to rush you. Are you sure you have found all of the inaccuracies?

A. I'm not certain. I would have to go through it more [fol. 225] thoroughly but—

Q. Well, those that you have mentioned, did you complain to Mr. Conley before signing this about those?

A. I didn't go into detail of each one that I told you about, but I did tell him that it was inaccurate and that it was not complete and that it was words out of context in some places.

Q. But you didn't point out anything to him that was inaccurate?

A. No, sir, don't recall.

Q. So your objection was just general, like you're giving it now, isn't that so?

A. No, it was quite a bit differently than I'm giving it to you now.

Q. But you didn't mention any specific items or any inaccuracies?

A. No, sir.

Q. All right, sir. Now, Mr. Sansone, did you tell Mr. Conley specifically that you did not pay taxes on these two transactions in 1956 and '57 because of the anticipated expenditures that you were going to have to make in connection with the tract that you retained?

A. That I had not recovered my cost with respect to that, yes, sir.

[fol. 226] Q. Now, did you tell him specifically that you did not pay the tax on the two sales because you had not recovered your cost?

A. Yes, sir.

Q. Did you also say that you did not pay because of the additional expenditures you were going to make on the remaining portions of the tract that you retained title?

A. I'm sorry, I missed—

Q. All right, sir, I'll ask it again.

Did you say specifically that you did not pay tax on the two sales in '57 and '56 because of the anticipated expenditures you were going to make in connection with the property that you had retained?

A. I don't recall saying it in those specific words, sir.

Q. Well, did you say that in substance, sir, not using the specific words?

A. Yes, sir.

Q. Did you also tell him that same thing in substance in Omaha, sir, when you were in that conference?

A. I don't recall.

Q. Now, sir, after you sold the D-X tract and the Gulf tract, did you have any obligation to make any additional repairs on either one of those tracts? A. No, sir.

Mr. Martin: No further questions, your Honor.

[fol. 227] Mr. Wadden: Just a couple more, Judge.

Redirect examination.

By Mr. Wadden:

Q. Mr. Sansone, when you went to Omaha in June of 1961 for this proposed interview, who did you expect to be interviewed by?

A. By—by an agent.

Q. Prior to your visit to Omaha, had you contacted any attorney in connection with this case?

A. No, sir.

Q. Had you contacted an attorney when Mr. Conley was visiting you?

A. No, sir.

Q. When you got to Omaha, who actually presented themselves to interview you?

A. There were three attorneys. Mr. Conley was the gentleman that first I met there.

Q. After you found out that you were being interviewed by two attorneys what change of mind did you have, if any, as to whether you had better see an attorney?

A. I thought that I had better see an attorney.

Q. Is that why the interview was not a lengthy one?

A. That's right.

Mr. Wadden: I have no further questions, your Honor.

[fol. 228] Mr. Martin: No further questions.

The Court: You can stand aside.

(Witness excused.)

The Court: Call your next witness.

Mr. Wadden: Mr. Vlasis.

George Vlasis, being produced, sworn and examined as a witness in behalf of the defendant, testified as follows:

Direct examination.

By Mr. Wadden:

Q. Mr. Vlasis, would you state whether or not you were mayor of the City of Ballwin, Missouri, in 1956?

A. April of that year, sir.

Q. April of that 1956. Did you run in a Democratic election?

A. Non partisan.

Q. What was one of your platforms that you ran on?

A. Well, we had a very bad sewer problem in the entire city, in fact, the surrounding cities at that time, and it was a hot issue in all elections.

Q. Did Fish Pot Creek—was Fish Pot Creek a part of that controversy?

A. It was.

Q. Prior to your becoming the elected mayor, what posi-
[fol. 229] tion, if any, did you hold out there in Ballwin?

A. Prior to that time, none, sir.

Q. All right, sir. Do you know Mr. Sansone, the defendant in this case?

A. Yes, sir.

Q. Would you keep your voice up, please?

A. Yes, sir.

Q. Mr. Vlasis, when did you first meet Mr. Sansone?

A. Sometime after April of 1956, after my election as mayor.

Q. Would you tell the ladies and gentlemen of the jury what conversation, if any, you had with Mr. Sansone during the summer of 1956 as pertains to the property he owned?

A. Well, during this period, due to the sewage problem on Fish Pot Creek in general, all the way down the line, we had had several complaints, also on all commercial ground along the Highway 100 of Manchester Road, and his was one of the worse problems there in that it had the Fish Pot Creek crossing and a low dip in the front, which caused a greater problem than any other spot in the area, and we had received numerous complaints from residents, and it was on that basis that I had talked to him.

Q. Now, did you personally visit Fish Pot Creek in 1956, the warm months?

[fol. 230] A. On many occasions.

Q. Would you tell these folks and his Honor what that creek looked like in 1956 during the summer and what it smelled like, if anything?

A. Well, the general area of the creek, as with most large drainage areas, it had indentations where your affluent would stay during the warm months when there wasn't a lot of rain and your offal wasn't great, and you

had a stagnation, odor and smell, you had mosquitoes. We had, to the northwest of that property, what is commonly known in the engineering profession as a sluice box which was supposed to be primary treatment for septic tank and this was, I might add, very primary, we had about six along there that I inherited and it created a very strong stench in that entire area.

Q. What did you notice, if anything, as to live sewage?

A. As to what kind?

Q. Live sewage.

A. Live sewage, this affluent as I mentioned, was very, very primary, it was alive, had bacteria. The Health Department knew of the situation and at that time we were powerless to do anything as far as pumping it out of the area. The trunk line wasn't in as yet.

Q. Now, during the late summer of 1956, and/or the early fall, what conversation did you have, if any, with [fol. 231] Mr. Sansone about whose responsibility it was going to be to correct the conditions you just described that existed on his land?

A. Due to the various complaints I talked to Mr. Sansone on numerous occasions, had walked over the ground with aldermen and other officials that were interested, and we had told him that some corrective measure would have to be taken. We were a small town, and in our infancy, and had no qualified engineer. Prior to taking any legal action were were going to hire a qualified engineering firm to tell us what had to be done, and we hadn't gotten to that point because it was our policy to try to build the town commercialwise and be as lenient as possible, and we had held off at that particular time to take any legal action, and also there was one other problem, the highway was involved in the entire situation.

Q. You, as mayor of Ballwin, of course, were interested, were you not, in the plans that the Highway Road Commission had for the widening of the Manchester Road?

A. Yes, sir.

Q. Did you keep yourself abreast of what the Highway Commission was doing in connection with these plans during 1956 and '57?

A. Very much so. We had made contacts with the Kirkwood—the office of the Missouri State Highway Department on Kirkwood Road, in Kirkwood, Missouri. In '57, if my [fol. 232] memory serves me right, or thereabouts, within a few months, I headed a delegation of some thirty to seventy, at various times were in at the Highway Commission hearing in Jeff City, and from that period on, for several years, we were promised a highway, or the beginning of construction, and it was in a state of suspension for several years.

Q. Were you aware, sir, that the Highway Commission also had some plans in connection with Fish Pot Creek?

A. I did know that, sir; yes, sir.

Q. Now, what, if any, moratorium, did you give Mr. Sansone in connection with when he would have to start work on fixing up the creek?

A. As to the exact date, I can't mention, but on several occasions we told him that he would have to take some stopgap measures until the highway situation was cleared. At one juncture I believe he hauled some timbers in, he did some grading and knocking trees down, cutting weeds, and his intent was to shore up the bank, and I remember it, at that time, but subsequent to that, a heavy rain came through there and I believe washed some of these timbers down the creek.

Q. Mayor, did you tell Mr. Sansone that you would not expect him to make the permanent improvement until the Highway Commission had finalized their plans in connection with the creek?

[fol. 233] A. That is right, because as I said, the policy of the Board was to be as lenient as possible, and the cost involved without knowing what the ultimate plan of the Highway Department was going to be, these, as I mentioned earlier, were changed from time to time, and not knowing these things, we sort of bore with he and other people in a like situation.

Q. Now, during the year of 1956, and '57, were you mayor out there?

A. Yes, sir.

Q. At any time during 1956 and '57, as the mayor, were you able to ascertain what the Highway Commission was

finally going to do with Manchester, or was finally going to do with this creek?

A. There was no definite plan at that time.

Mr. Wadden: Your witness.

Cross examination.

By Mr. Martin:

Q. Mr. Vlasis, you say Mr. Sansone did some work on the creek?

A. There was some grading and some timber hauled in there with the idea of trying to shore up the banks and take some trees out and cutting some weeds and so forth, when the residents to the rear—there's some one hundred twenty homes to the rear—had complained on the situation there. [fol. 234] Q. Now, sir, that sewage wasn't coming into Fish Pot Creek off of the property outlined in crayon on this Exhibit C, was it?

A. On your—let's see, northwest corner of the property, yellow portion on your right there, that first lot there, no, come on down to your—

Mr. Wadden: Why don't you step down there and point it out?

By Mr. Martin:

Q. I'm referring to 1956 and '57.

A. Right, all up and down here (indicating), through here, this was sluice box and one of them was located on Lot 56, right in this general area here, somewhere abutting this property, possibly right on the line.

The Court: Read the question to the witness.

(Whereupon, the reporter read the question.)

By Mr. Martin:

Q. Was my question clear?

A. Yes, sir. It wasn't coming in off of this property, it was coming in right at this juncture abutting the property, it was creating the hazard and stagnating through here.

Q. Now, so, sir, the sewage about which you were complaining was being placed in Fish Pot Creek by properties other than that owned by Mr. Sansone?

A. That is right, sir.

Mr. Martin: You may have your seat back, sir.

[fol. 235] No further questions, your Honor.

Mr. Wadden: May he be finally excused, your Honor?

The Court: It's up to you gentlemen.

Mr. Martin: It's agreeable with us.

Mr. Wadden: Thank you very much, Mr. Vlasis.

(Witness excused.)

The Court: Call your next witness.

Mr. Wadden: Mr. Bilhorn.

Judge, you'll be pleased to hear this is our concluding witness.

The Court: This is your last?

Mr. Wadden: Yes, your Honor.

EDWARD W. BILHORN, being produced, sworn and examined as a witness in behalf of the defendant, testified as follows:

Direct examination.

By Mr. Wadden:

Q. Mr. Bilhorn, where do you presently live, sir?

A. I live at 28 South Ridge Drive, in Glendale, St. Louis County.

Q. What is your occupation?

A. I'm in private practice as a consulting engineer.

Q. Would you give us a little of your engineering experience and the societies you belong to?

[fol. 236] A. I was educated at the University of Illinois in both mechanical and civil engineering. I left the University and went five years in World War II as a commissioned officer. I hold a rank of Lieutenant Colonel in the Corps of Engineers presently. I have registered to practice engineering in the State of Missouri. I am a member of

the local, state and national societies of Professional Engineers. I'm a member of the Missouri Association of Consulting Engineers, and I am on the Board of the National Consulting Engineers Counsel.

Q. Are you in fact presently City Engineer for any nearby city?

A. I hold a retainer of the City Engineer for the City of Sunset Hills in St. Louis County, we're also consultants for Grantwood Village, City of Olivette and the City of University City.

Q. Mr. Bilhorn, directing your attention to the summer of 1956, perhaps earlier than that, did you have occasion to meet Mr. Sansone?

A. Yes, sir.

Q. Incidentally, during the early part of 1956, did you own any property along Manchester Road?

A. One of our corporations.

Q. One of your corporations?

A. Of a business that I then was an owner in owned [fol. 237] the property immediately to the south of and across Manchester Road from the property that Mr. Sansone owned.

Q. Did I correctly indicate as I ran east and west on Manchester on this exhibit?

A. That's from old Ballwin Road on the east to new Ballwin Road on the west.

Q. During the summer of 1956, did you have occasion to go on Mr. Sansone's property across the street from you?

A. Yes, sir.

Q. Did you go over there for the purposes of inspecting the conditions in his creek?

A. Yes, sir.

Q. Now, would you tell the ladies and gentlemen of the jury what that creek was like on his property during the summer of 1956?

A. It was a rather rambling and ragged-banked creek, handling the storm water flow from quite a large watershed. It also had quite a bit of raw sewage affluent flowing in it from some upland properties which were at that time a property within the greater community. I was primarily interested in this because all of the problems on that side of

the road ended up on my side, which was further downstream.

Q. Did you have conversations during the summer of 1956 with Mr. Sansone concerning the conditions on both [fol. 238] his property and your property?

A. Yes, sir.

Q. What conversations, if any, did you have with Mr. Sansone as to what you believed would have to be done on his property to permanently correct the condition?

A. The development of our property required certain improvements to be made on our property. I was trying to design those so that they would be consistent with the requirements that would have to be met on his side of the road, so that the resolution of the problem became a combined problem to insure that the things that I did didn't have a deleterious effect on the things that he would have to correct on his side of the river.

Q. Let me ask you, Mr. Bilhorn, did you meet Mr. Vlasis during the summer of '56?

A. Yes, sir.

Q. How did you happen to come in contact with Mr. Vlasis?

A. At that time Mr. Vlasis either had just become or was about to become the mayor of the City of Ballwin and we were summoned before the city council of the City of Ballwin and told very positively and definitely that we, ourselves on our side of Manchester, plus other major property owners along the watershed, were going to have to combine our interests and provide funds into a common fund, if no other way could be found, to correct the problems that [fol. 239] were existent along this watershed.

Q. Now, sir, what did you tell Mr. Sansone concerning the best way you felt he could permanently correct the conditions in his creek during the year of 1956? I mean what, if anything, did you recommend to him would be the best way to handle it?

A. I recommended to him that he employ a very similar measure which we were already involved in on our side—

Mr. Martin: If the court please, I'll object. This answer is not responsive as yet to the question.

The Court: Be overruled.

By Mr. Wadden:

Q. Go ahead, Mr. Bilhorn.

A. The correction of a creek bank such as this was going to require the construction of probably retaining walls to preclude further erosion and also to provide the best way to control the land toward its wisest and best use.

Q. When you say retaining walls, would you describe what type of retaining walls you were talking about as pertains to his property? Let's keep it on his property.

A. My recommendation to him that it would be my suggestion that he put reinforced concrete retaining walls in on his side on both banks through his property.

Q. At the time you talked—

The Court: Mr. Witness, didn't I understand you to say a minute ago that they said it was the problem in the entire [fol. 240] area?

The Witness: That is correct, there was a problem.

The Court: The city was going to require you all to put this in, or was this your recommendation?

The Witness: This—first, let me make sure that we're talking the same language. The city merely informed us that we were all going to have to figure out a way to help solve the problem, in a general manner. Now, specifically, on Mr. Sansone's property, he asked for my recommendations, knowing that we were working on our side, as to the best manner for him to meet the city's requirements, and I recommended to him that he put reinforced concrete retaining walls on both banks of the creek through his property.

By Mr. Wadden:

Q. That would be along both banks going up this red on this exhibit here, is that correct?

A. This would also include some realignment of the creek.

Q. Rechanneling?

A. That is correct, straightening out the channel for better flow conditions.

Q. Now, in 1956, did you have any information, definite information, as to what the State Highway Commission planned in connection with this creek, that is, definite plans?

A. No definite plans, no, sir. We had unfortunately indefinite plans of what they intended to do.

[fol. 241] Q. Mr. Bilhorn, would you tell the ladies and gentlemen of the jury and his Honor and Mr. Martin here what you estimated it would cost, without knowing exactly what the highway plans were going to be, to put these reinforced, rock-imbedded walls along the creek on Mr. Sansone's property?

A. The best of my recollection the cost that was estimated for that, assuming a height of ten feet for the retaining walls, was approximately $50 minimum per running foot of the creek bank.

Q. And how many running feet of creek bank did you feel you were working with?

A. As near as I can recollect there was approximately five to six hundred feet of creek on Mr. Sansone's property, so we have to double that figure because we have to put retaining wall on both sides of the creek, so we're talking approximately 1,200 lineal feet of retaining wall.

Q. From which would be subtracted however far the state went into his property in the development—if they went in two hundred feet then you would be talking about a thousand feet, is that right?

A. That's right, because wherever the state went you no longer had possession of it.

Q. Would this be an estimated cost of between fifty and sixty thousand dollars?

[fol. 242] A. Every bit of that, yes, sir.

Q. Did Mr. Sansone make it clear to you that he expected to have to fix the conditions on his property when the state got through doing what they were going to do?

A. Yes, sir.

Mr. Wadden: Your witness:

Cross examination.

By Mr. Martin:

Q. Mr. Bilhorn, is that all one word?

A. That's correct, that's my last.

Q. How do you spell that, sir, I didn't get the spelling?

A. B-i-l-h-o-r-n.

Q. Mr. Bilhorn, did you measure the length of the bank of the creek?

A. Did I hear you correctly?

Q. Did you measure the length of the bank of the creek?

A. No, as I recall, we scaled it off of drawings. I have also walked that creek its full length. This was an approximation. We were dealing in unit costs rather than total costs.

Q. Now, sir, the condition of the creek which you have described, did that start in 1956?

A. The condition?

Q. Yes, sir.

[fol. 243] A. I don't quite follow what you mean by "the condition".

Q. You have described to us the terrible condition of the creek, sir, during this period of time—

A. Yes, sir.

Q. —covered by your direct examination. Now, I am asking you, did that condition begin during the year of 1956?

A. The requirements to correct the condition—

Q No, sir, just a moment. I will see if I can make it clearer.

A. All right.

Q. You have described certain conditions of the creek as it pertained to sewage and flooding and things of that sort, sir.

A. Right.

Q. You recall describing those?

A. Yes, sir.

Q. Now, sir, I'm asking you, sir, did those conditions which you have described begin during the year of 1956?

A. The sanitary problems did, or became apparent in 1956.

The Court: Mr. Witness, the answer to that question is yes or no.

The Witness: I think we have a—

The Court: Then you can make any explanation you [fol. 244] want.

The Witness: The creek served two functions.

The Court: He didn't ask you that. Read him the question.

(Whereupon, the reporter read the question.)

Mr. Wadden: Judge, I'm going to object to the form of the question.

The Court: Restate the form of the question so he may understand it.

By Mr. Martin:

Q. Mr. Bilhorn, you have described to us the condition of the creek during the time or during the period of time when you were consulting with Mr. Sansone about improvements and repairs?

A. Right.

Q. Now, you have in mind those conditions which you have described pertaining to the flooding and the sewage conditions?

A. Yes, sir.

Q. Now, sir, did those conditions start or begin during the year of 1956? In other words, did they exist prior to '56 or did they just start in 1956?

Mr. Wadden: Judge, that's the objection I have to the question, whether he's talking about flooding is one condition, and sewage is one condition. If he would describe the particular condition he's talking about, I think the [fol. 245] witness could answer.

The Court: He's talking about the conditions that this witness explained that was there, as I understand his question.

Mr. Wadden: I do too, your Honor, but this assumes that the flooding and the sewage all started at the same time, and I respectfully submit to the court that there may have been flooding without sewage prior to 1956.

Mr. Martin: Your Honor, I'll ask it over again.

The Court: Rephrase it for him.

By Mr. Martin:

Q. Now, Mr. Bilhorn, those conditions which you have described to us, that were existing during the time you were consulting with Mr. Sansone about repairs to the creek, and I understand you were consulting with him during 1956?

A. Right.

Q. Can you tell us when any of those conditions began? We can separate the sewage, the flooding, if you know, when any of those conditions started.

A. The sanitary sewage problems became evident and occurred during 1956.

The Court: Will you listen to his question and answer it, and make any explanation you want to. Did they begin in 1956? Are you telling this jury that the first sewage [fol. 246] dumped in that creek was in 1956?

The Witness: The first apparent knowledge of them, yes, sir, because there had been a major amount of housebuilding that occurred upstream immediately prior to this.

The Court: I don't care anything about that. What he's asking you, this man that was elected mayor said there were six of those up in there, that were there when he was elected, now were they all put in there in '56? That's what he's asking you, if you know.

The Witness: The generation of sufficient sewage became apparent in 1956.

By Mr. Martin:

Q. Sir, were you familiar with the area prior to 1956?

A. Yes, sir.

Q. Now, prior to 1956, was there any sewage flowing through Fish Pot Creek?

A. I was not aware of it.

Q. Now, has that condition which you have described about the creek pertaining to sewage and flooding been corrected?

A. No, sir. There have been some partial corrections.

Q. Was the system of retaining wall used in making those partial corrections?

A. No, sir.

Q. When you say "partial", what degree of completion [fol. 247] would you say, or what do you mean by "partial"?

A. A trunk line sewer has been constructed that generally follows Fish Pot Creek, all the way through and further on downstream, past the City of Ballwin. The sewer does not entirely follow the creek bed in Fish Pot Creek. Also, this same trunk sewer has not yet been hooked up to a major number of homes that are still creating sewage affluent problems upstream. In other words, those houses have not yet been hooked up. Some of them have been hooked up, so there has been a partial alleviation of the sanitary sewage disposal problems that were creating the health hazard and nuisance along Fish Pot Creek.

Q. Were those hazards corrected or those improvements made by the individual landowners, sir?

A. The City of Ballwin made several of us, including me, a contributor to the building of that trunk sewer line.

Q. In other words, the city did it and the landowners just contributed to—

A. No, the city did not do it. As I recall, we, ourselves, myself, were one of the signatories in a tripartite contract that the City of Ballwin insisted that St. Louis County Health Department, City of Ballwin, and ourselves participated in to provide funds into escrow and a private sewer company then built the sewer trunk, or the trunk sewer system.

[fol. 248] Mr. Martin: No further questions.

Mr. Wadden: I have nothing further, Judge.

The Court: You can stand aside.

(Witness excused.)

The Court: Do you have any more witnesses?

Mr. Wadden: We will produce no further witnesses, your Honor.

I might say at this time to the court and the government that we waive the husband-wife privilege of Mrs. Sansone and tender her to the government as a witness for any

use they might want to make. We are not going to use her, but—

The Court: That statement, I would assume, is made for the benefit of the jury. That's very generous coming on the eve of rebuttal. You appreciate, of course, that they have closed their case?

Mr. Wadden: Sir?

The Court: I say you understand they have closed their case except on rebuttal?

Mr. Wadden: Yes, sir.

The Court: During the night recess, ladies and gentleman of the jury, do not discuss the case among yourselves, let anyone talk to you or talk to anyone about it. Should there be any publication with respect to it, or any reference on any newscast, do not listen.

You can file out at this time and be back at ten o'clock [fol. 249] in the morning.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

(Whereupon, discussion was held off the record.)

The Court: The reason I made the statement is because Mrs. Sansone is not a party, and you represent Mr. Sansone, and I don't believe that so far as this record is concerned that they have any right to do that. If you want to call her in the morning, you can call her.

Mr. Wadden: I apologize to the court, I did not mean to indulge in any type of improper practice.

I'm sorry, Judge. I didn't mean to be any type of improper—

The Court: That's all right.

Announce a recess until ten o'clock in the morning.

(Whereupon, court stood at recess until ten o'clock a.m. of Wednesday, July 3, 1963.)

[fol. 250]

MORNING SESSION, WEDNESDAY, JULY 3, 1963

Pursuant to adjournment as aforesaid, at ten o'clock a.m. of Wednesday, July 3, 1963, the court met present and presiding as before, and the trial continued as follows:

The Court: You gentlemen may proceed.

Plaintiff's Rebuttal Testimony

Whereupon, the plaintiff, to rebut the testimony offered by the defendant, offered testimony, oral and documentary, and made admissions as follows:

Henry G. Purk, being produced, and having previously been sworn and examined as a witness in behalf of plaintiff, testified further as follows:

Direct examination.

By Mr. Martin:

Q. Will you state your name, please, sir?

A. Henry G. Purk.

Q. You're the same Henry G. Purk who previously testified in this trial?

A. Yes, sir.

Q. You have been sworn, sir?

A. Yes, sir.

Q. You understand you're still testifying under oath?

A. Yes, sir.

Q. Mr. Purk, were you in Phoenix, Arizona, with Mr. [fol. 251] Conley when he interviewed the defendant, Michael C. Sansone?

A. Yes, sir.

Q. Were you with him at the defendant's home?

A. Yes, sir.

Q. On what dates were you there, sir?

A. I believe that was May 3rd, 4th and 5th of 1960.

Q. You also had conversations with the defendant during the course of this interview?

A. Yes, sir.

Q. And you also heard some conversations between the defendant and Mr. Conley?

A. Yes, sir.

Q. Now, sir, tell us, if you recall hearing any conversations between the defendant and Mr. Conley, or if you had a conversation with the defendant pertaining to the creek across the property in question that is outlined here on Plaintiff's Exhibit C?

A. Yes, sir, both Mr. Conley and myself, we had discussions with Mr. Sansone in regard to the creek.

Q. Will you tell us, sir, what, if anything, Mr. Sansone said about the creek?

A. The way the creek rambles along Manchester there, a good portion of that creek eliminates the use of the land that fronts there on Manchester. However, the Highway [fol. 252] Department is going to widen Manchester and at that particular time they're going to change the creek bed, the route of the creek, and as a result it will give him more useful land.

Q. Now, who said that?

A. Mr. Sansone.

Q. Was there any discussion or mention of the straightening of the bed or the channel of the creek by means of putting in retaining walls or by other means?

A. No, sir, I have no recollection of that.

Q. Did Mr. Sansone mention anything about the cost of rechanneling the creek or putting in retaining walls?

A. No, sir.

Mr. Martin: No further questions.

Cross examination.

By Mr. Wadden:

Q. Mr. Purk, you were Mr. Conley's partner in connection with this investigation, weren't you?

A. Yes, sir.

Q. And you discussed with him recently the facts in this case, have you not?

A. Yes, sir.

Q. And you have read his report, haven't you?

A. Yes, sir.

Q. Incidentally, Mr. Purk, this Exhibit C is a blown-up [fol. 253] reproduction of something that Mr. Sansone drew for you all in Phoenix, isn't it?

A. That's correct, sir.

Q. Who drew this creek in on the original?

A. I don't know, sir.

Q. Well, did you see Mr. Sansone doing it?
A. I don't recall.
Q. But you were with Mr. Conley, right?
A. Yes, sir.

Mr. Wadden: I have no further questions.
The Court: You can stand aside.

(Witness excused.)

The Court: Call your next witness.
Mr. Martin: That's all the government has, your Honor.
The Court: Do you have anything else?
Mr. Wadden: Not a thing, Judge.

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

Mr. Rosenblum: Let the record show at the close of all the evidence the defendant moves for a judgment of acquittal on both counts for the same reasons that are alleged in the motion for judgment of acquittal at the close of the government's case, that there was no offense proved against the United States of America, and for all the other reasons contained therein as to the lack of proof of the essential elements of the offense.

[fol. 253a] The Court: Be overruled.

Will you gentlemen come in the office, and we'll take probably about a fifteen or twenty-minute recess, ladies and gentlemen of the jury. We'll call you when we're ready.

Announce a ten-minute recess.

(Whereupon, a short recess was taken, pursuant to which the trial proceeded as follows:)

* * * * * * *

[fol. 290]

AFTERNOON SESSION, WEDNESDAY, JULY 3, 1963

Pursuant to adjournment as aforesaid, at one-thirty o'clock p.m. of Wednesday, July 3, 1963, the court met present and presiding as before, and the trial continued as follows:

(Whereupon, the court charged the jury as follows:)

COURT'S CHARGE TO JURY

The Court: Ladies and gentlemen of the jury:

It now becomes my duty to give you instructions as to the law which you will use and be governed by and apply to the facts in this case in reaching your verdict on the questions that are presented to you for decision.

In this case I want to remind you at the outset, although you, from the attitude you have displayed throughout this case, are doubtless well aware of it, you are a part of the administration of justice in this court, and a very important part. You, as the jury in the case, are just as much officers of this court as the judge of this court; and it is just as necessary that you perform your duties as officers and jurors fairly, impartially and in accordance with the law, as it is that I as the judge of the court, or any other officer of this court, so conduct himself.

You have listened to the evidence and the argument of counsel in this case with very commendable patience. In approaching and performing your duties, you should have but one purpose; you should have a zeal and a determination to do justice, exact and impartial, between the government on the one hand and the defendant on the [fol. 291] other.

Under the practice in this court instructions are given to you orally, as I am now doing. It is, therefore, necessary that you pay close attention so that you may carry these rules of law to your jury room and there use and apply them to the facts of this case. You should bear in mind that while it may appear from time to time that I am giving you special instructions, that is not correct. I don't give you separate instructions, but give you one charge, and the charge is given to you as a whole, to be used and applied to the case as a whole, and it would be highly improper if you should disregard a part of the charge and use only the remainder, because in that event the charge would not fit the case. Unless otherwise indicated, each instruction given you should be considered by you as referring, separately and individually, to each count of the indictment.

During the charge there will be references to the defendant or to his return or adjusted gross income or gross in-

come, and so on, and you will understand that in those instances that we are referring to the joint return of the defendant and his wife and to the joint net income and joint adjusted gross, and so on, or whatever the case may be. We have in some instances just used the word "his" or "defendant", rather than setting it out in full, "joint income", or whatever it may be, or "he and his wife."

[fol. 292] There is one other particular in which cases in the Federal Court differ from cases in the state court, ladies and gentlemen, and that is this: It is your sole duty in this case to pass upon the guilt or innocence of the defendant. If you find the defendant guilty, you have nothing whatever to do with the punishment, as under the law the punishment is left to the court.

Now, I want to direct your attention to some of the general rules of law that are applicable to this case, just as they are to all trials in the Federal Court.

In this case, ladies and gentlemen, you must, of course, bear in mind that you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, as well as the evidence and the facts and circumstances concerning the unreported income in Count 1 for the calendar year 1956, and in Count 2 for the calendar year 1957, detailed before you, and which have been presented in this trial, but in passing upon the evidence and in passing upon the factual issues of the guilt or innocence of the defendant, you should be guided and should determine those matters according to certain rules of law which it is the duty of the court to give you, and you should accept these rules of law and follow them and apply them in deciding the factual issues. You should do that whether you agree with the rules of law that I give you or not. You, of course, understand that these rules of law are not original with [fol. 293] me, but these are rules of law that have been announced by our Supreme Court and by the appellate courts, and found in the statutes, and if there is an error in declaring the law to you, it is the error of the court. It is your duty to follow the law as you receive it from the court.

If, during the course of these instructions, and if during this trial the court has said or shall say anything that indi-

cates to how the court might feel or how you think the court feels with respect to the testimony in this case, and that opinion is different from your opinion of the testimony, you are to accept your opinion of the testimony rather than the court's, because it is your sole province to pass on the testimony, and from the testimony you pass upon the credibility of the witnesses, and with that the court has nothing to do, just as you, as members of the jury, have nothing to do with determining what the law is in this case.

In this case the prosecution is based upon a statute which is Federal law, the applicable part of which reads as follows:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony,"

and shall be punished as the statute provides.

Now, that is the statute upon which the prosecution is [fol. 294] based on Counts 1 and 2 of the indictment.

The indictment in this case, based upon the statute that I have just read to you, omitting the formal commencement, reads as follows:

> "Count 1:
>
> "The grand jury charges that on or about the 16th day of April, 1957, in the Eastern Division of the Eastern District of Missouri, Michael C. Sansone, who during the calendar year 1956 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis District, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $1,500.78 and that the amount of tax due and owing thereon was the sum of $320.95, whereas, as he then

and there well knew, their joint taxable income for the said calendar year was the sum of $6,513.37, upon which said taxable income there was owing to the United States of America an income tax of $1,373.73.

"In violation of Section 7201, Title 26, United States Code."

[fol. 295] And the applicable part of that statute I read to you just a moment ago.

"Count 2.

"The grand jury further charges that on or about the 14th day of April, 1958, in the Eastern Division of the Eastern District of Missouri, Michael C. Sansone, who during the calendar year 1957 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957, by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis District, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $2,963.94 and that the amount of tax due and owing thereon was the sum of $648.81, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $13,108.83, upon which said taxable income there was owing to the United States of America an income tax of $3,105.29.

"In violation of Section 7201, Title 26, United States Code," which is the statute that I read you the applicable portion from.

You will note that in the indictment, as well as in the [fol. 296] statute, the words "willfully" and "attempt" are used, and also in the indictment the word "knowingly" and "fraudulent" are used.

You are advised the word "willfully" as used, means intentionally, that is, not accidentally, and it connotes or

carries with it the idea of knowledge of the criminality of the act alleged to have been committed.

The word "knowingly" as used means that state of mind wherein the defendant was in possession of the facts from which he knew or was aware that he could not lawfully do the act whereof he here stands charged.

"Fraud" within the meaning of the indictment here returned, means actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing, and mere negligence or carelessness, whether slight or great, is not equivalent or sufficient. Fraud is never imputed or presumed, and you may not find the defendant guilty upon circumstances, if any, which create only suspicion.

The gist of the offense charged in the indictment in Counts 1 and 2 is willful attempt on the part of a taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt" as used in this law, involves two elements: First, an intent to evade or defeat the tax, and second, some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the calendar year 1956 [fol. 297] he had an income in such year which was taxable and which the defendant was required by law to report for the year 1956, as set forth in Count 1, and that during the calendar year 1957 he had an income in such year which was taxable and which the defendant was required by law to report for the year 1957, as set forth in Count 2, and that the defendant attempted to evade or defeat a portion of the tax thereon by purposely failing to report all of the income which the defendant had during the calendar year 1956 in Count 1, and the calendar year 1957 in Count 2, and which the defendant knew it was his duty to state in his returns for the years 1956 and 1957.

There are various schemes, subterfuges and devices that may be resorted to, to evade or defeat the tax. The one alleged in this indictment with respect to Counts 1 and 2 is that of filing a false and fraudulent return with the intent to defeat the tax or liability. The gist of the crime consists in willfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a willful attempt, that is to say, intentionally done, with the intent that the government should be defrauded of income tax due from the defendant, by keeping from the government a tax imposed by the income tax laws, which he knew it was his duty to pay to the government.

It is the position of the government as set forth in Counts [fol. 298] 1 and 2 of the indictment that the defendant filed or caused to be filed with the Director of Internal Revenue at St. Louis, Missouri, fraudulent income tax returns for himself and his wife for the calendar years 1956 and 1957, as set forth in Counts 1 and 2, and that they were fraudulent in that they failed to state correctly all of his and his wife's net income that was subject to tax and to state correctly the tax thereon, and the government charges that the income tax returns filed for the years 1956 and 1957, as set forth in Counts 1 and 2 were false, in that the defendant stated his and his wife's taxable income in an amount that was less than the actual taxable income received by the defendant and his wife during the calendar years 1956 and 1957, and it is further the position of the government that when the defendant filed or caused to be filed his and his wife's taxable income tax returns for the years 1956 and 1957, he well knew that he and his wife's taxable income for the years 1956 and 1957 was in excess of the amount which he inserted or caused to be inserted in the returns signed and filed by him, and that the defendant's act in so causing to be prepared and filed such income tax returns was with the intent and with the purpose on the part of the defendant of attempting to defeat and evade income tax due and owing by him to the United States Government.

Now, the defendant, on the other hand, takes the position that in the taxable year 1956, he and his wife purchased [fol. 299] a single tract of land in Ballwin, Missouri, for $22,500 from House Hunters, Inc., and simultaneously with this purchase sold a portion thereof to the D-X Sunray Oil Company for $20,000 cash, and that in the taxable year 1957 they sold another portion thereof to the Gulf Oil people for $27,000 cash, leaving them at the close of the taxable year 1957 as the owners of the remainder of the original

tract over which flowed Fish Pot Creek. The defendant does not deny that he failed to report in his 1956 tax return any income from the D-X sale and in his 1957 return any income from the Gulf sale, but his position is that at the time he filed his 1956 and 1957 returns he honestly believed that he was not required to report these sales because he thought he would have to spend approximately $40,000 in the near future to correct the health and safety hazards of Fish Pot Creek on his land which, until he did so and either sold or developed the remainder of the tract so purchased from House Hunters, would make it impossible to determine his profits, if any, from his 1956 and 1957 sales. It is further the defendant's position that he was unfamiliar with and honestly did not know that under proper tax accounting he should have allocated portions of the original cost of the entire tract, in accordance with their 1956 assessed valuations, to the parcels sold in 1956 and in 1957, and should have subtracted such allocated costs from the sales price received in each instance in order to determine his gain; and finally, it is the position of the defendant that he filed [fol. 300] his income tax returns for 1956 and 1957 in accordance with such understanding and honest belief and that he did not knowingly and willfully fail and refuse to report thereon his true and correct net income for the calendar years 1956 and 1957 in an attempt to evade and defeat the payment of income taxes.

So the charge and position of the government in this case, and the position of the defendant, present as the real issue for you to pass on, as to Counts 1 and 2 of the indictment, a very simple matter: Did the defendant willfully and knowingly fail and refuse to report his true and correct net income for the calendar year 1956, as set forth in Count 1, and to report his true and correct net income for the calendar year 1957, as set forth in Count 2 of the indictment, by reporting a lesser amount, as charged in the indictment? And if the defendant did fail to report his true and correct net income, then, as to such action on the part of the defendant, was it performed willfully, intentionally and knowingly, in an attempt by the defendant to evade or defeat his income taxes for the years 1956 and 1957 imposed by law and due on the unreported income?

That is the question for you to pass upon, and that is the real issue in this case as to Counts 1 and 2 of the indictment.

The court further instructs the jury that the mere filing [fol. 301] of a false or fraudulent income tax return, or the willful failure to pay an income tax due, are not of themselves sufficient to constitute an offense under this indictment; that before you can convict the defendant under either Counts 1 or 2 of this indictment, it is incumbent upon the government not only to prove beyond a reasonable doubt that the defendant filed a false and fraudulent income tax return, but they must go further and prove beyond a reasonable doubt that the defendant committed some willful and fraudulent act or acts, the likely effect of which would be to mislead or conceal from the taxing officers the amount of income upon which the tax is levied, and if the government fails to prove all of the aforesaid, including willful and fraudulent act or acts to mislead or to conceal, the defendant should be acquitted as to Counts 1 and 2.

I have read the indictment to you. This indictment constitutes no evidence whatsoever of the defendant's guilt and is not to be considered by you in that connection whatever. It ought not in your minds create even a suspicion of guilt upon his part. The indictment is merely the formal charge by which a criminal case such as this is brought into this court, and the fact that an indictment has been returned ought not to be considered as any evidence of the guilt of the defendant. Its sole function is to identify the offense with which the defendant is here charged. The defendant is presumed to be innocent, and that presumption continues with him until such a time as you become satisfied from [fol. 302] the evidence of his guilt, and you must be so satisfied beyond a reasonable doubt.

You are further instructed that the defendant is not charged in this indictment in Counts 1 and 2 with an intentional and willful failure to make a return and pay a tax, but he is charged with a much more serious offense of attempting to evade and defeat substantial income taxes by false and fraudulent statements contained in the income tax returns for the years in question.

One of the material allegations in the indictment is that the defendant attempted to evade and defeat substantial income tax due, substantially as charged in Counts 1 and 2 of the indictment, by filing or causing to be filed with the Director of Internal Revenue an income tax return containing fraudulent statements, substantially as set out in Counts 1 and 2 of the indictment, which I have read to you.

A fraudulent statement is a false statement made by a person knowing at the time it was made that it was false, and made with the intent and purpose to deceive and mislead some person. So that one of the matters which becomes a material allegation with respect to Counts 1 and 2, which the government must prove beyond a reasonable doubt, is that such statements when made were false and known by the defendant to be false at the time they were made, and were made with the intent on the part of such defendant to conceal from the Director of Internal Revenue, true and [fol. 303] correct adjusted gross income received during the calendar years in question, substantially as set out in Counts 1 and 2 of the indictment, and in this manner defendant attempted to evade and defeat that part of the income tax which was not reported in the income tax returns in question, if a part of the income tax for said years was not so reported by the defendant in the income tax returns as set out in Counts 1 and 2.

Now, in a criminal case, the matter of intent is an essential element which must exist in order for the accused to be criminally liable.

Therefore, in order to find the defendant guilty, you must not only believe that he did the acts complained of, and of which he here stands charged, but you must also believe that the acts were intentionally and knowingly done by the defendant.

In determining the guilt or innocence of the defendant, it is your duty to consider his explanation of the facts and circumstances which tend to demonstrate his good faith and honesty in dealing with the government, even though his explanation may be mistaken as to the law. If the defendant, at the time of the filing of a return, honestly and in good faith believed that all the taxes due were paid, he is not guilty of criminal tax evasion.

Intent is a mental state—a mental operation purely. Of course, you cannot look into a person's mind and tell what [fol. 304] his intent may be with respect to a given matter. Intent ordinarily must be gathered from one's actions, together with the facts and circumstances surrounding a person's actions. So, when intent is sought to be shown by the actions of the person in question, and the surrounding circumstances, there must be proof of facts by or from which the specific intent can be inferred and determined with certainty—that is, such proof of intent must establish this element of the charge beyond a reasonable doubt.

So, I say to you, that ordinarily with a knowledge of definite acts committed, together with the facts and circumstances, one is enabled thereby to draw definite conclusions therefrom. We are in our daily affairs constantly called upon to decide from actions of others what their intentions and purposes may be. Experience tells us that sometimes actions speak more clearly than spoken or printed words of what one's intent may be.

A careful and intelligent consideration of facts and circumstances shown by the evidence in any given case will enable one to determine what may or may not be another's intentions and what his intentions were, or were not, in doing certain things. And we are concerned now with what the defendant's intentions were at the time these income tax returns were executed and filed by him, not what his intentions may have been a year later or what his intentions may have been at the time of this trial.

[fol. 305] In determining the defendant's intention in this case, take into consideration all the facts and circumstances, and exhibits offered in evidence.

The defendant is presumed to be innocent and the burden is upon the government to prove the guilt of the defendant beyond a reasonable doubt. The presumption of innocence as described is a substantial right which the law affords to a defendant, and it follows the defendant throughout this trial and entitles him to an acquittal at your hands unless the guilt of such defendant has been proven to your satisfaction and beyond a reasonable doubt.

If upon consideration of all the evidence there is a reasonable doubt of the guilt of the defendant remaining, the accused is entitled to the proof of that doubt by an acquittal, for it is not sufficient to establish a probability of guilt, but the evidence must establish the truth of the charge to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reasoning and judgment of the jurors, who are bound to act conscientiously upon it.

The term "reasonable doubt" which I have just used, has a very definite meaning, and I will tell you what it means: A reasonable doubt, ladies and gentlemen, is a doubt based on reason, and which is reasonable in view [fol. 306] of all the evidence. If, after an impartial comparison and consideration of all the evidence, you candidly can say that you are not satisfied of the guilt of the defendant, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you truthfully can say that you have an abiding conviction of the guilt of the defendant, such as you would be willing to act upon in some weighty and important matter relating to your own affairs, you have no reasonable doubt. Putting it another way, a reasonable doubt means a substantial doubt, and not the mere possibility of innocence.

This rule on the meaning of reasonable doubt applies to every material element of the offense charged by the indictment. Of course, there is almost always difficulty in proving a fact to an absolute certainty, a complete certainty; therefore, I remind you that a reasonable doubt does not mean a mere possibility of innocence, imaginary doubt, a mere conjecture. So, I summarize: The defendant is entitled to any reasonable doubt you may have in your minds as to his guilt, and as to each count of the indictment this applies, and if there is a reasonable doubt he is entitled to an acquittal at your hands as to each count of the indictment to which there is a reasonable doubt, and at the same time, remember, members of the jury, also, that if you have no such reasonable doubt as to the guilt of the defendant as to either count of the indictment, then the government is entitled to a verdict at your hands as to

[fol. 307] each count of the indictment as to which you have no reasonable doubt.

You must bear in mind in passing on the guilt or innocence of the defendant when you retire to your jury room, each of the two counts constitute a separate charge, and each count of the indictment should be considered by you in arriving at the guilt or innocence of the defendant separately. Under the evidence you must find the defendant guilty or not guilty as to each count of the indictment, just as though the defendant were not charged in another count, as though one count in the indictment.

The government's evidence as you may find it as to the adjusted gross income and taxable income of the defendant for the calendar years 1956 and 1957, covered by Counts 1 and 2 of the indictment, may not correspond precisely with the amount stated in the indictment. It is not necessary that the government prove that the amount of the defendant's adjusted gross and taxable income for the calendar years 1956 and 1957, covered by Counts 1 and 2 of the indictment, was the exact amount set forth in Counts 1 and 2 of the indictment, as the defendant's actual net income for the year set forth in each count, but it is necessary before the defendant can be convicted on one or both counts of the indictment that as to the charge in the indictment under Count 1 that the government prove that the defendant had a substantial taxable income for the calendar year 1956 in excess of the amount shown on his re-[fol. 308] turn, and under Count 2 that he had a substantial taxable income for the calendar year 1957 in excess of the amount shown in his return, and that the amount of income tax on his actual income, had it been reported for the years 1956 and/or 1957 would have been substantially in excess of the amount of the income tax on the return filed for 1956 and/or 1957, and unless you find the failure of the defendant to report his taxable income for the calendar year 1956 and for the calendar year 1957, if you so find, was done willfully and knowingly, with an intent to defeat or evade payment of the income tax on such income not reported, then the defendant cannot be convicted for the failure to report correctly his income, regardless of the

amount of income and tax paid. In other words, innocent failure of the defendant to report truly his taxable income or any act in failing to report his true taxable income which was not done knowingly and in an attempt by the defendant to defeat and evade income tax on such income not reported, cannot be used to form the basis of conviction for knowingly and willfully failing to report income in an attempt to evade payment of income tax thereon.

There are two kinds of evidence, direct and circumstantial evidence. The charges against the defendant in this case may be proven by either direct or circumstantial evidence. Whether they have so proven is for you to decide. Some of the evidence presented in this case is what is termed circumstantial evidence, as distinguished from direct evidence.

[fol. 309] The weight to be given to circumstantial evidence can be stated very simply, and the rule is this: In order to justify a jury in finding a verdict of guilty based entirely or substantially on circumstantial evidence, the facts must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence.

Stated another way: Not only must the facts relied on to show guilt be proved beyond a reasonable doubt, but such facts must be consistent with all other facts introduced in a chain of circumstances, and such facts must further be inconsistent with any other rational conclusion than that of guilt.

The guilt of a defendant may be shown by circumstantial evidence. Whether it has been is for you to determine. When circumstantial evidence is relied upon to establish a charge of the character and kind contained in the indictment, it is not necessary that all the circumstances concur to show the existence of facts sought to be proved by the government, but such circumstantial evidence must be inconsistent with any other rational conclusion.

So I say to you, ladies and gentlemen, that you are to consider all the circumstances and conditions shown in the evidence, and if it appears to you, even though there is no

direct evidence of the actual commission by the defendant of the offense charged in the indictment, a reasonable in-
[fol. 310] ference from all the facts and circumstances does, to your minds, beyond a reasonable doubt, show the defendant guilty of the offense charged in the indictment, you should make your deductions accordingly. If the evidence fails to convince you beyond a reasonable doubt of the guilt of the defendant as to Counts 1 or 2, or either of them, you should find the defendant not guilty.

The court further instructs the jury that any oral or written statement made by the defendant, even though it should contain matter that proves his guilt, is admissible in evidence against the defendant and is to be given such probative value as evidence as you believe it deserves, if you find it was voluntarily given, and in this regard the court instructs you that by the term "voluntarily" the court means not secured by trickery, fraud or deceit. However, the court instructs you that to make a confession voluntary in nature, it is not necessary to show that such confession or statement be spontaneous, that is, made without questioning.

The court further instructs the jury that if you find that trickery, fraud or deceit were practiced upon the defendant by the government's agent in order to secure the defendant's statement of May 5, 1960, you are to reject such statement as evidence.

You have observed that there has been testimony in this case which may be properly designated as expert testi-
[fol. 311] mony. That is to say, the testimony of persons skilled in some art, trade or science, or who have knowledge and experience in relation to matters which are not within the knowledge of men of common education and experience.

You are instructed that such opinion evidence as has been given in this case is competent evidence for your consideration, and in your deliberations you are entitled to give such weight and value as you may think it entitled, measured by the same standard as you would weigh the evidence of any other competent witness in the case.

The jury is further instructed that merely because representatives of the government charged with auditing income

tax returns of Michael C. Sansone for the calendar years 1956 and 1957, respectively, have testified in this case, does not entitle their testimony to any greater weight or credibility than that accorded any other witness or witnesses in this case.

When a defendant in a case of this kind takes the stand —which he has a perfect right to do—he is subjected to all the obligations of a witness, and his testimony is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the matter of his testimony, and the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember—you have a perfect right to do so, and it is your duty [fol. 312] to do so—the very vital interest the defendant has in the outcome of this case.

But, his interest, or bias, or anything else that may affect his testimony, is a matter which, of course, you as jurors should consider. Therefore, I say to you, in considering the testimony of the defendant, you are to consider the very vital interest which he has at stake in this case.

Ladies and gentlemen, you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In weighing and reconciling the testimony, you should look to the demeanor and the manner of the witness testifying, his willingness to answer; to the lack of interest, or interest, of any witness in the case; to the relationship of any witness to the parties in the case; to the means of knowledge, or lack of knowledge, of the facts about which the witness testifies; to the opportunity of the witness to know the facts about which he purports to testify; to the reasonableness or unreasonableness of the testimony of the witness; to its probability or improbability, and whether the witness has made contradictory statements or not, about material matters involved in this case; and having thus carefully considered all the matters, you must fix the weight and value of each and every witness and of the evidence as a whole.

If you should conclude that a witness has willfully tes-
[fol. 313] tified falsely to some material matter in the case, you should consider that in determining the credibility of the rest of such witness' testimony, as well as the part which you feel to have been willfully false.

I do not mean to say to you that any witness has willfully testified falsely to any material matter in this case. I give you the rule that you may use it in your good judgment, as the facts in this case warrant and justify. Generally speaking, you, without doubt, have recognized that what I have said to you regarding the manner in which you should pass on the testimony of the various witnesses and things you should consider, that it simply means that you should use your own good judgment and sound common sense, just as you would in acting upon the most vital and important matters pertaining to your own affairs. Pass on the facts of this case in the light of your knowledge of the natural tendencies and propensities of human beings.

Based solely on the evidence and under these instructions, free of any prejudice, sympathy, or bias, reach a verdict in this case. Carry on your deliberations, ladies and gentlemen, in a calm, cool and deliberate manner. You should freely consult with one another in your jury room in discussing any one of the issues. If any one of you should be convinced in his own mind that his view on the factual issues, or factual issue, in the case is erroneous, then such juror should not be stubborn, such juror should
[fol. 314] not hesitate to abandon a view, if the jury is convinced it is erroneous. It is entirely proper, it is a juror's duty to adhere to a view or conclusion which, in the juror's mind, after a full exchange of ideas and discussions, the juror believes to be correct and right, but no juror should substitute or accept the opinion of other jurors for his own opinion merely for the sake of expediency.

When all of you agree to a verdict, then the verdict is the verdict of you as a jury. Your verdict must be unanimous. You will find a form of verdict—I will give to the bailiff a form of verdict to take with you to the jury room, and it reads as follows:

"United States of America, Plaintiff, versus Michael C. Sansone, Defendant, Cause No. 63Cr 36.

"Verdict.

"We, the jury in the above entitled cause on the trial of the indictment herein find as follows:

"We find the defendant," and then there is a blank space left, "as charged in Count 1 of the indictment."

Below that:

"We find the defendant," and another blank space left, "as charged in Count 2 of the indictment."

Into those two blank spaces, which I have indicated, you will write "guilty" or "not guilty" as you find the defendant guilty or not guilty of the charges contained in the [fol. 315] indictment.

You will find a place for the foreman alone to sign the verdict as such, and when you retire to your jury room to deliberate on this case you will select one of your number as foreman and he or she will sign the form of verdict and represent you as spokesman in any further conduct in this court of this case.

You will also find a place where it should be dated.

If, during the course of your deliberations you decide that you want the exhibits that were offered in evidence simply notify the bailiff by giving him a note, whom you will find outside the door, and any exhibits introduced that you ask for will be given to you.

Will you take the jury out?

Mrs. Carter, if you will just remain with us, please. We have twelve able-bodied jurors and we're going to let you go home early.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: The court is very appreciative of your services, Mrs. Carter, and that's particularly true since you were called from one of the other courts, and insofar as this case is concerned, it's been submitted to the jury now, and the twelve went through, so you will be excused at this time. The court wants to thank you very much.

[fol. 316] The Court: Do you want to make your record?

Mr. Rosenblum: Very brief, your Honor.

DEFENDANT'S EXCEPTIONS TO COURT'S CHARGE

I want to except to the court's failure to give defendant's offered instructions, I believe they're 1 and 2, they both involve the lesser offense instructions, on the grounds Instruction No. 1, involving Section 7203 of the Internal Revenue Code, that such instruction is justified as a lesser offense instruction for the reasons that are stated at the bottom of the requested instruction, which was rejected by the court. The reasons there may be incorporated by reference and fully state the defendant's reasons for taking exception to the court's ruling.

The same objection with respect to defendant's requested instruction No. 2, with respect to the lesser offense, Section 7207, defendant excepts on the grounds this is a lesser included offense, that there is a necessary overlapping of this offense with the one charged in the indictment, and for the reasons which are stated in Judge Matthes' dissent in Janko versus United States, 281 Federal Second, that this 7207 applies to income tax violations, the defendant excepts to the court's ruling and failure to give this instruction.

No other exceptions.

The Court: Announce a ten-minute recess.

(Whereupon, the court stood at recess awaiting the verdict of the jury.)

[fol. 317] (Whereupon, the jury returned to the court room and the following proceedings were had and entered of record:)

The Court: Members of the jury, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you pass it forward?

The Clerk: (Reading):

"UNITED STATES DISTRICT COURT

EASTERN DIVISION

EASTERN DISTRICT OF MISSOURI

No. 63Cr 36 (1)

"UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL C. SANSONE,

Defendant.

VERDICT

"We, the jury in the above entitled cause, on the trial of the indictment herein find as follows:

"We find the defendant not guilty as charged in Count One of the indictment.

"We find the defendant guilty as charged in Count Two of the indictment,

(Signed) "Harold F. Clark,
Foreman.

"Dated this 3rd day of July, 1963."

The Court: Is that your verdict, ladies and gentlemen? [fol. 318] The Jurors: Yes, it is.

The Court: The court wants to thank you very much, and you'll be excused at this time until Monday, July 22nd.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

Mr. Rosenblum: Your Honor, may we request ten days to file motion for new trial?

The Court: Yes, today is the 3rd. That will put you over to the 13th.

Supposing we defer sentence until Friday the 19th, which is the Friday after the motion is due. We'll take up the motion at that time and take care of the sentence at that time.

He'll be permitted to go under the bond he's under now.

Mr. Martin: All right, that's Friday the 19th?
The Court: That's right, Friday the 19th.

(Thereafter, on July 11, 1963, defendant filed his motion for judgment of acquittal or in the alternative for a new trial, which said motion, omitting caption, is in words and figures as follows:)

"DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL AND DENIAL THEREOF

"Comes now the defendant in the above captioned matter and respectfully moves for a judgment of acquittal, or in [fol. 319] the alternative for a new trial, and as ground for said motion states:

"1. That all of the evidence adduced at the trial failed to make a prima facie case of a violation of Section 7201, Title 26 U. S. Code because the prosecution failed to prove by independent evidence the requisite specific intent to support the crime charged and (as a matter of law) failed sufficiently to corroborate defendant's admissions of May 5, 1960, so as to enable said admissions to support a judgment of conviction by establishing the essential element of defendant's *scienter*."

(Thereafter, on July 19, 1963, came again the parties and the following proceedings were had on defendant's motion for new trial and imposition of sentence:)

The Court: United States vs. Michael Sansone.
You want to be heard on the motion?
Mr. Rosenblum: Your Honor, I haven't received any reply brief from the government so I don't want to take the court's time. Everything I have said or could say is contained in the memorandum which is filed in support of the defendant's motion for acquittal. Not having received an answer from the government I feel I have nothing to add to the merits of the motion for judgment of acquittal.

The Court: I went into that, and also the Scarbeck case [fol. 320] that you wrote me about this week, and it's the ruling of the court that the motion for judgment of acquittal or in the alternative for a new trial is overruled in all particulars.

You will prepare the formal order, Mr. Martin, and bring it to me and I will sign it and file it.

Do you have anything to add?

Mr. Martin: No, the government has nothing further to add.

The Court: How about you?

Mr. Rosenblum: Well, your Honor, I think the court is well aware of the facts surrounding the defendant's background, I think I have nothing to add further to what has already been said. The court listened carefully to the evidence, knows the amount of taxes that were involved, and I'm sure is aware of the defendant's background and service, the fact that he has recently been promoted to Major, and the other family conditions which might influence the court in setting a sentence for this defendant. They are just things, your Honor, that I think should not be bared in open court; your Honor is fully advised.

The Court: I've been advised, of course, with respect to some of this. Of course, as far as the court itself, the defendant, he didn't see fit to fill it out and send it in to the probation officer. I've been advised, however, by co-counsel, I think yesterday, with respect to the matter.

IMPOSITION OF SENTENCE

In the case of 63Cr 36, United States vs. Michael C. [fol. 321] Sansone, on the jury finding you guilty under Count 2 of the indictment, it is the judgment of the court that you be committed to the custody of the Attorney General under Count 2 for a period of fifteen months, and that you be fined the sum of $2,000.00.

Do you want—

Mr. Rosenblum: Yes, your Honor, may the defendant continue under the same appeal bond and be permitted to return to his home in Phoenix, Arizona?

The Court: I think he probably has to file an appeal bond.

Mr. Rosenblum: A thousand dollars?

The Court: I think he'll have to file a new appeal bond. The court will set the amount of the bond at $2,500.00.

Mr. Rosenblum: May the defendant—

The Court: And he can go under the bond he's under now for—how much time does he need to get the other bond?

Mr. Rosenblum: I would say Monday, your Honor, week from Monday.

The Court: He can go under the bond he is under now for a week, that will be next Friday. That will give you time in the meantime to prepare your notice and file the bond under the new setup.

Mr. Rosenblum: May he proceed to Phoenix, Arizona, after the bond has been filed?

[fol. 322] The Court: I think as far as the bond is concerned, he can go anywhere he wants to go. The bond wouldn't undertake to keep him here. He's free to go, as far as the other bond is concerned, any place he wants to. It doesn't undertake to hold the man down as far as that's concerned.

Mr. Rosenblum: I see. All right, thank you.

[fol. 323] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 324]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTED INSTRUCTION No. 1

Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.

A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:

> "Any person required under this title to pay any * * * tax, * * * who willfully fails to pay such tax, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor."

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say "Guilty of violating a lesser-included offense."

If you have a reasonable doubt as to whether defendant willfully failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts.

(Substantially this instruction has been rejected by the Eighth Circuit most recently in *Foley* v. *U.S.*, 290 F.2d 562. It is offered here to protect the record in the event the Supreme Court grants certiorari on the [fol. 325] point. Furthermore, this may well be the one appropriate case for giving it even under the

Eighth Circuit's view. In *Dillon*, 218 F. 2d 97, the Eighth Circuit pointed out there was no evidence to show a willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed. Here the defendant's statement of May 5, 1960 *is* evidence of a willful failure to pay when due i.e., he knew that he should have paid the tax, but intended to pay it later after solving his financial difficulties and he had no intent to evade the proper payment of his taxes. Since this is the government's evidence of intent, it not only supports a willful failure to pay, but actually denies a willful intent to evade; and a lesser offense instruction is proper because there is present here absolutely none of the other "badges of fraud", such as poor records, cover schemes, etc. Here by the government's own evidence the willfulness is directed not only toward a then present failure to pay the tax but also to a later payment thereof after his financial difficulties are solved; this plus his denial of an intent to evade the ultimate payment of his taxes would, if believed by the jury, permit a finding only of willful failure to pay on which the defendant is entitled to have the jury instructed.)

[Handwritten notation—7/3—Refused—RWH]

[fol. 326]

DEFENDANT'S REQUESTED INSTRUCTION No. 2

As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:

"Any person who willfully delivers or discloses to the Secretary [of the Treasury] or his delegate any * * * return, * * *, * * * or other document known by him

to be fraudulent or to be false as to any material matter,"

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say "Guilty of violating a lesser-included offense."

If you have a reasonable doubt as to whether defendant willfully so delivered under any count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt [fol. 327] in favor of the defendant and acquit him of the lesser-included offense as to such count or counts.

(Substantially, this instruction was rejected by the Eighth Circuit in *Janko* v. *U.S.*, 281 F. 2d 156 because §7207 is not held to apply to income tax violations. It is sought to preserve this point for possible review in the Supreme Court for the reasons stated in Judge Matthes' dissenting opinion.)

[Handwritten notation—7/3—Refused—RWH]

[fol. 328]

DEFENDANT'S REQUESTED INSTRUCTION No. 3

In determining the defendant's intention in this case, you may take into consideration the forthright manner or lack of forthright manner in which the defendant handled the purchase from House Hunters and the sales to D-X and Gulf and his deposit of the monies therefrom; you may con-

sider the circumstances under which his returns were filed and the reasonableness or lack of reasonableness of his misunderstanding as to the tax law and proper method of allocating cost; you may also consider his cooperation or lack of cooperation with the revenue agents who interviewed him, his signed statement, and the circumstances under which you find he signed this statement in 1960 in determining its value as to proof of his intent in 1957 and 1958 when he filed his tax returns. By pointing out these considerations, I do not preclude others; you should, of course, take into consideration all the facts and circumstances offered in evidence.

[Handwritten notation—7/3—Refused—RWH]

[fol. 329]

DEFENDANT'S REQUESTED INSTRUCTION No. 6

When a defendant in a case of this kind takes the stand—which he has a perfect right to do—he is subjected to all the obligations of a witness, and his testimony is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the matter of his testimony, and the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. His interest, or bias, or anything else that may affect his testimony, is a matter which, of course, you as jurors should consider. Therefore, I say to you, in considering the testimony of the defendant, you are to consider the very vital interest which he has at stake in this case.

(Given by Judge Harper in *U.S.* v. *Foley*, except reference to defendant's possible perjury omitted as suggested in Eighth Circuit's opinion, 290 f.2d 562, 569. In the Foley case, the defendant failed to demonstrate that he was prejudiced; here the defendant, unlike Foley, has testified contrary to a government agent regarding the circumstances of his statement of May 5, 1960 which bear heavily on his criminal intent. To give the paragraph omitted here from the Foley in-

struction would twice call the jury's attention to the defendant's very vital interest in this case, unduly emphasizing it, and would imply that as between Conley and the defendant, the latter is more likely to have committed perjury. Under this particular fact situation and on this record, the mention of perjury is prejudicial.)

[Handwritten notation—7/3—Refused but given in substance—RWH]

[fol. 330]

GOVERNMENT'S INSTRUCTION No. .....

You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge of things that are out in the open and obvious to him, and say "I have no knowledge of those facts". If a man honestly believes he has paid all the taxes he owes, he is not guilty of criminal evasion, but if he acts without reasonable ground for belief that his conduct was lawful, it is for you to decide whether he was acting in good faith or whether he intended to evade the tax. The question of intent is a question you must determine for yourselves from a consideration of all the evidence.

[Handwritten notation—7/3—Refused—RWH]

[fol. 331]

GOVERNMENT'S INSTRUCTION No. 1

The prosecution is based upon a statute which is Federal Law, which reads as follows:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payments thereof, shall, in addition to other penalties provided by the law, be guilty of a felony, and upon conviction thereof . . . "

and then, "shall be punished as the statute provides, with which you are not interested.

Now, that is the statute upon which the prosecution is based on Counts 1 and 2 of the indictment.

The indictment in this case, based upon the statute that I have just read to you, omitting the formal commencement, reads as follows:

"The Grand Jury charges:

That on or about the 16th day of April, 1957, in the Eastern Division of the Eastern District of Missouri,

MICHAEL C. SANSONE,

who during the calendar year 1956 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis District, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $1,500.78 and that the amount of tax due and owing thereon was the sum of $320.95, whereas, as he then and [fol. 332] there well knew, their joint taxable income for the said calendar year was the sum of $6,513.37, upon which said taxable income there was owing to the United States of America an income tax of $1,373.73.

In violation of Section 7201, Title 26, United States Code.

—SECOND COUNT—

The Grand Jury further charges:

That on or about the 14th day of April, 1958, in the Eastern Division of the Eastern District of Missouri, MICHAEL C. SANSONE, who during the calendar year 1957 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957, by filing and causing to be filed with

the District Director of Internal Revenue for the St. Louis District, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $2,963.94 and that the amount of tax due and owing thereon was the sum of $648.81, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $13,108.83, upon which said taxable income there was owing to the United States of America an income tax of $3,105.29.

In violation of Section 7201, Title 26, United States Code."

[Handwritten notation—7/3—Given in substance—RWH]

[fol. 333]

GOVERNMENT'S INSTRUCTION No. 2

That is the statute in each count which I have just read to you.

You will note that in the indictment, as well as in the statute, the words "willfully" and "attempt" are used, and also in the indictment the word "knowingly" is used.

You are advised that the word "willfully" as used, means intentionally, that is, not accidentally, and it connotes or carries with it the idea of knowledge of the criminality of the act alleged to have been committed.

The word "knowingly" as used means that state of mind wherein the defendant was in possession of the facts from which he knew or was aware that he could not lawfully do the act whereof he here stands charged.

"Fraud", within the meaning of the indictment here returned, means actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing, and mere negligence or carelessness, whether slight or great, is not equivalent or sufficient. Fraud is never imputed or presumed, and you may not find the de-

fendant guilty upon circumstances, if any, which create only suspicion.

[Handwritten notation—7/3—Given in substance—RWH]

[fol. 334]

GOVERNMENT'S INSTRUCTION No. 3

The gist of the offense charged in the indictment in Counts 1 and 2 is willful attempt on the part of a taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt" as used in this law, involves two elements: "(1), an intent to evade or defeat the tax, and (2), some act done in furtherance of such intent." The word "attempt" contemplates that the defendant had knowledge and understanding that during the calendar year 1956 he had an income in such year which was taxable and which the defendant was required by law to report for the year 1956, as set forth in Count 1, and that during the calendar year 1957 he had an income in such year which was taxable and which the defendant was required by law to report for the year 1957, as set forth in Count 2, and that the defendant attempted to evade or defeat a portion of the tax thereon by purposely failing to report all of the income which the defendant had during the calendar year 1956 in Count 1, and the calendar year 1957 in Count 2, and which the defendant knew it was his duty to state in his returns for the years 1956 and 1957.

[Handwritten notation—7/3—Given—RWH]

[fol. 335]

GOVERNMENT'S INSTRUCTION No. 4

There are various schemes, subterfuges and devices that may be resorted to, to evade or defeat the tax. The one alleged in this indictment with respect to Counts 1 and 2 is that of filing a false and fraudulent return with the intent to defeat the tax or liability. The gist of the crime consists in willfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a willful attempt, that is to say, intentionally done, with the intent that the government should be defrauded of income tax due from the defendant, by keeping from the government a tax imposed by the income tax laws, which he knew it was his duty to pay to the government.

[Handwritten notation—7/3—Given—RWH]

[fol. 336]

GOVERNMENT'S INSTRUCTION No. 5

It is the position of the government as set forth in Counts 1 and 2 of the indictment that the defendant filed or caused to be filed with the Director of Internal Revenue at St. Louis, Missouri, fraudulent income tax returns for himself and his wife for the calendar years 1956 and 1957, as set forth in Counts 1 and 2, and that they were fraudulent in that they failed to state correctly all of his and his wife's net income that was subject to tax and to state correctly the tax thereon, and the government charges that the income tax returns filed for the years 1956 and 1957, as set forth in Counts 1 and 2 were false, in that the defendant stated his and his wife's taxable income in an amount that was less than the actual taxable income received by the defendant and his wife during the calendar years 1956 and 1957, and it is further the position of the government that when the defendant filed or caused to be filed his and his wife's taxable income tax returns for the years 1956 and 1957, he well knew that he and his wife's taxable income for the years 1956 and 1957 was in excess of the amount which he inserted or caused to be inserted in the returns signed and filed by him, and that the defendant's act in so causing to be prepared and filed such income tax returns was with the intent and with the purpose on the part of the defendant of attempting to defeat and evade income tax due and owing by him to the United States Government.

[Handwritten notation—7/3—Given—RWH]

[fol. 337]

DEFENDANT'S REQUESTED INSTRUCTION No. 9

Now the defendant, on the other hand, takes the position that in the taxable year 1956 he and his wife purchased a single tract of land in Ballwin, Missouri, for $22,500 from House Hunters, Inc. and simultaneously with this purchase sold a portion thereof to the D-X Sunray Oil Co. for $20,000 cash and that in the taxable year 1957 they sold another portion thereof to the Gulf Oil people for $27,000 cash, leaving them at the close of the taxable year 1957 as the owners of the remainder of the original tract over which flowed Fishpot Creek. The defendant does not deny that he failed to report in his 1956 tax return any income from the D-X sale and in his 1957 return any income from the Gulf sale, but his position is that at the time he filed his 1956 and 1957 returns he honestly believed that he was not required to report these sales because he thought he would have to spend approximately $40,000 in the near future to correct the health and safety hazards of Fishpot Creek on his land which (until he did so and either sold or developed the remainder of the tract so purchased from House Hunters) would make it impossible to determine his profits, if any, from his 1956 and 1957 sales. It is further the defendant's position that he was unfamiliar with and honestly did not know that under proper tax accounting he should have allocated portions of the original cost of the entire tract (in accordance with their 1956 assessed valuations) to the parcels sold in 1956 and in 1957 and should have subtracted such allocated costs from the sales [fol. 338] price received in each instance in order to determine his gain; and finally, it is the position of the defendant that he filed his income tax returns for 1956 and 1957 in accordance with such understanding and honest belief and that he did not knowingly and willfully fail and refuse to report thereon his true and correct net income for the calendar years 1956 and 1957 in an attempt to evade and defeat the payment of income taxes.

(The defendant in a criminal case is entitled to a specific instruction on the theory of his defense, as against a mere general or abstract charge, if there is evidence to support it and if a proper request for such an instruction is made, *Apel* v. *U.S.*, 247 F.2d 277, 282 (CA-8, 1957). He is entitled to a request as to any factual theory of defense for which there is any foundation in the evidence no matter how weak or incredible that evidence may be, see *US* v. *Blount*, 229 F.2d 669 (CA-2, 1956); *U.S.* v. *O'Connor*, 237 F.2d 466 (CA-2, 1956), and *U.S.* v. *Indian Trailer Corp.*, 226 f.2d 595 (CA-7, 1955).

[Handwritten notation—7/3—Given—RWH]

[fol. 339]

GOVERNMENT'S INSTRUCTION No. 6

You are instructed that the mere filing of a false or fraudulent income tax return, or the willful failure to pay an income tax due, are not of themselves sufficient to constitute an offense under this indictment; that before you can convict the defendant under either Count 1 or 2 of this indictment, it is incumbent upon the government not only to prove beyond a reasonable doubt that the defendant filed a false and fraudulent income tax return, but they must go further and prove beyond a reasonable doubt that the defendant committed some willful and fraudulent act or acts, the likely effect of which would be to mislead or conceal from the taxing officers the amount of income upon which the tax is levied, and if the government fails to prove all of the aforesaid, including willful and fraudulent act or acts to mislead or to conceal, the defendant should be acquitted as to Counts 1 and 2.

[Handwritten notation—7/3—Given—RWH]

[fol. 340]

DEFENDANT'S REQUESTED INSTRUCTION No. 7

In determining the guilt or innocence of the defendant, it is your duty to consider his explanation of the facts and circumstances which tend to demonstrate his good faith and honesty in dealing with the government, even though his explanation may be mistaken as to the law. If the defendant, at the time of the filing of a return, honestly and in good faith believed that all the taxes due were paid, he is not guilty of criminal tax evasion.

(Given by Judge Harper in *U.S.* v. *E. Paul Black*)

[Handwritten notation—7/3—Given—RWH]

[fol. 341]

GOVERNMENT'S INSTRUCTION No. 10

The government's evidence as you may find it as to the adjusted gross income and taxable income of the defendant for the calendar years 1956 and 1957, covered by Counts 1 and 2 of the indictment, may not correspond precisely with the amount stated in the indictment. It is not necessary that the government prove that the amount of the defendant's adjusted gross and taxable income for the calendar years 1956 and 1957 covered by Counts 1 and 2 of the indictment, was the exact amount set forth in Counts 1 and 2 of the indictment, as the defendant's actual net income for the year set forth in each count, but it is necessary before the defendant can be convicted on one or both counts of the indictment that as to the charge in the indictment under Count 1 that the government prove that the defendant had a substantial taxable income for the calendar year 1956 in excess of the amount shown on his return, and under Count 2 that he had a substantial taxable income for the calendar year 1957 in excess of the amount shown in his return, and that the amount of income tax on his actual income, had been reported for the years 1956 and/or 1957 would have been substantially in excess of the amount

of the income tax on the return filed for 1956 and/or 1957, and unless you find the failure of the defendant to report his taxable income for the calendar year 1956 and for the calendar year 1957, if you so find, was done willfully and knowingly, with an intent to defeat or evade payment of the income tax on such income not reported, then the defendant cannot be convicted for the failure to report correctly his income, regardless of the amount of income and tax paid. In other words, innocent failure of the defendant to [fol. 342] report truly his taxable income or any act in failing to report his true taxable income which was not done knowingly and in an attempt by the defendant to defeat and evade income tax on such income not reported, cannot be used to form the basis of conviction for knowingly and willfully failing to report income in an attempt to evade payment of income tax thereon.

[Handwritten notation—7/3—Given—RWH]

[fol. 343]

GOVERNMENT'S REQUESTED INSTRUCTION No. 11

The Court instructs the jury that any oral or written statement made by the defendant, even though it should contain matter that proves his guilt, is admissible in evidence against the defendant and is to be given such probative value as evidence as you believe it deserves, if you find it was voluntarily given.

And in this regard, the Court instructs you that by the term "voluntarily" the Court means not secured by trickery, fraud or deceit.

However, the Court instructs you that to make a confession voluntary in nature, it is not necessary to show that such confession or statement be spontaneous, that is, made without questioning.

[Handwritten notation—7/3—Given—RWH]

[fol. 344]

DEFENDANT'S REQUESTED INSTRUCTION No. 5

If you find that trickery, fraud, or deceit were practiced upon the defendant by the government's agent in order to secure the defendant's statement [of May 5, 1960] you are to reject such statement as evidence.

(This instruction is copied from *Smith* v. *U.S.*, 348 U.S. 147 where it was claimed the taxpayer's statement was procured on the basis of a misrepresentation by a government agent to the taxpayer. There was conflicting evidence on this issue at the trial; the government agent denied it and the taxpayer's accountant supported the taxpayer's claim. In commenting on the above instruction the Supreme Court wrote, l.c. 151: "The issue of fraud or deceit on the part of the Government agent was properly submitted to the jury, and the jury, in arriving at its general verdict, could have found from the conflicting evidence that no fraudulent inducement had been offered petitioner or his accountant." On the general question of the defendant's right to have the issue of voluntariness submitted to the jury where there is a conflict of evidence, see *Smith* v. *U.S.*, 268 F.2d 416, 421 at fn. 3.)

[fol. 345]

DEFENDANT'S REQUESTED INSTRUCTION No. 4

You have observed that there has been testimony in this case which may be properly designated as expert testimony. That is to say, the testimony of persons skilled in some art, trade or science, or who have knowledge and experience in relation to matters which are not within the knowledge of men of common education and experience.

You are instructed that such opinion evidence as has been given in this case is competent evidence for your consideration, and in your deliberations you are entitled to give such weight and value as you may think it entitled, mea-

sured by the same standard as you would weigh the evidence of any other competent witness in the case.

The jury is instructed that merely because representatives of the government charged with auditing income tax returns of Michael C. Sansone for the calendar years 1956, and 1957 respectively, have testified in this case, does not entitle their testimony to any greater weight or credibility than that accorded any other witness or witnesses in this case.

(Given by Judge Harper in *U.S.* v. *E. Paul Black*)

[Handwritten notation—7/3—Given—RWH]

[fol. 346]

GOVERNMENT'S INSTRUCTION No. 7

This indictment constitutes no evidence whatsoever of the defendant's guilt and is not to be considered by you in that connection whatever. It ought not in your minds create even a suspicion of guilt upon his part. The indictment is merely the formal charge by which a criminal case such as this is brought into this court, and the fact that an indictment has been returned ought not to be considered as any evidence of the guilt of the defendant. Its sole function is to identify the offense with which the defendant is here charged. The defendant is presumed to be innocent, and that presumption continues with him until such a time as you become satisfied from the evidence of his guilt, and you must be so satisfied beyond a reasonable doubt.

[Handwritten notation—7/3—Given in substance—RWH]

[fol. 347]

GOVERNMENT'S INSTRUCTION No. 9

One of the material allegations in the indictment is that the defendant attempted to evade and defeat substantial income tax due, substantially as charged in Counts 1 and 2 of the indictment, by filing or causing to be filed with the

Collector of Internal Revenue an income tax return containing fraudulent statements, substantially as set out in Counts 1 and 2 of the indictment which I have read to you. A fraudulent statement is a false statement made by a person knowing at the time it was made that it was false, and made with the intent and purpose to deceive and mislead some person. So that one of the matters which becomes a material allegation with respect to Counts 1 and 2, which the government must prove beyond a reasonable doubt, is that such statements when made were false and known by the defendant to be false at the time they were made, and were made with the intent on the part of such defendant to conceal from the Collector of Internal Revenue, true and correct adjusted gross income received during the calendar years in question, substantially as set out in Counts 1 and 2 of the indictment, and in this manner defendant attempted to evade and defeat that part of the income tax which was not reported in the income tax returns in question, if a part of the income tax for said years was not so reported by the defendant in the income tax returns set out in Counts 1 and 2.

[Handwritten notation—7/3—Given in substance—RWH]

[fol. 348] Clerk's Certificate to foregoing papers (omitted in printing).

ST. LOUIS, MO.

FORM 1040 — U. S. INDIVIDUAL INCOME TAX RETURN—1957

U. S. Treasury Department, Internal Revenue Service

or Other Taxable Year Beginning ..... 1957, Ending ..... 19..

(PLEASE TYPE OR PRINT)

Name: MICHAEL C AND HELEN M SANSONE
(If this is a joint return of husband & wife, use first names of both)

Home address: 6331 PERSHING
(Number and street or rur l route)

UNIVERSITY CITY 5, MO.
(City, town, or post office) (Postal zone number) (State)

CE 80847

Your Social Security Number	Occupation	Wife's Social Security Number	Occupation
345 18 2289	SALESMAN	487 18 0834	TEACHER

If Income Was All From Salaries and Wages, Use Pages 1 and 2 Only. See Page 3 of the Instructions.

Exemptions

1. Check blocks which apply. Check for wife if she had no income or her income is included in this return.
   (a) Regular $600 exemption ..... ☒ Yourself ☒ Wife
   (b) Additional $600 exemption if 65 or over at end of taxable year. ☐ Yourself ☐ Wife
   (c) Additional $600 exemption if blind at end of taxable year ..... ☐ Yourself ☐ Wife
   Enter number of exemptions checked → 2
2. List first names of your children who qualify as dependents; give address if different from yours. TANYA MARIA SANSONE, ANTHONY SANSONE. Enter number of children listed → 2
3. Enter number of exemptions claimed for other persons listed at top of page 2 1
4. Enter the total number of exemptions claimed on lines 1, 2, and 3 5

Income

5. Enter all wages, salaries, bonuses, commissions, tips, and other compensation received in 1957, before payroll deductions.

Employer's Name	Where Employed (City and State)	(a) Wages, etc.	(b) Income Tax Withheld
BOARD OF EDUCATION	ST. LOUIS, MO	$ 4,760 00	$ 856 80
DEPT AIR FORCE	SCOTT AFB ILL	904 77	—
		130 48	6 48
		130 48	6 48
	Enter totals here →	$ 5925 73	$ 863 60

6. Less: (a) Travel, reimbursed expenses, etc. (See instructions, page 6. Attach required statements.) $ —
   (b) Excludable "Sick Pay" in line 5 $ —
7. Balance (line 5 less line 6) ..... $ 5925 73
8. Profit (or loss) from business from separate Schedule C 1,659 82
9. Profit (or loss) from farming from separate Schedule F .....
10. Other income (or loss) from page 3 (dividends, interest, rents, pensions, etc.) .....
11. ADJUSTED GROSS INCOME (sum of lines 7, 8, 9, and 10) ..... $ 7,585 55

If social security tax (FICA) withheld from your wages exceeded $94.50, see instructions, page 5.

Unmarried or legally separated persons qualifying as "Head of Household," see instructions, page 7, and check here ☐

Widows and widowers who are entitled to the special tax computation, see instructions, page 7, and check here ☐

Tax due or refund

12. Tax on income on line 11. (If line 11 is under $5,000, and you do not itemize deductions, use Tax Table on page 16 of instructions to find your tax and check here ☐. If line 11 is $5,000 or more, or if you itemize deductions, compute your tax on page 2 and enter here the amount from line 9, page 2) $ 592 79

If income was all from wages, omit lines 13 through 16

13. (a) Dividends received credit from line 5 of Schedule J ..... $ —
    (b) Retirement income credit from line 12 of Schedule K .....
14. Balance (line 12 less line 13) ..... $ 592 79
15. Enter your self-employment tax from separate Schedule C or F 56 02
16. Sum of lines 14 and 15 ..... $ 648 81
17. (a) Tax withheld (line 5 above). Attach Forms W-2 (Copy B) ..... $ 863 60
    (b) Payments and credits on 1957 Declaration of Estimated Tax (See page 2, instructions) 1 00 $ 864 60
    District Director's office where paid .....
18. If your tax (line 12 or 16) is larger than your payments (line 17) enter the balance due here → $ —

● ATTACH COPY B OF FORMS W-2 HERE ●

IN UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBIT B

[Vol. 349]

incurred expenses for machine hire, supplies, and the like.

All farmers should use separate Schedule F (Form 1040) to report their farm income whether reporting on the cash or accrual method.

Item A—Business Activity.—State the general classification of business activity, as well as the principal product or service. For example, "Wholesale food," "Retail men's apparel," "Manufacture of upholstered wooden household furniture," "Transportation by truck," "Broker, real estate," "Contractor—carpenter work," "Physician," etc. Do not use such terms as "partnership," "owner," "student," etc. The "principal business activity" is the one which accounts for the largest percentage of your total receipts. All trades and businesses except those specifically excluded are subject to self-employment tax.

Item C—Business Address.—Do not use home address as business address unless business is actually conducted from home.

Line 1—Total Receipts.—Include all income derived from your trade or business. Enter in the space provided such items as returned sales, rebates, and allowances from the sale price or service charge.

If you have dividend income from stocks held by you in the ordinary course of carrying on your trade or business, such dividends must be considered together with your dividends from stocks regularly held for investment purposes in computing your dividend exclusion and credit on pages 3 and 4, Form 1040.

Installment Sales.—If you use the installment method of reporting income from sales, you must attach to your return a schedule showing separately for the years 1954, 1955, 1956, and 1957 the following: (a) Gross sales; (b) cost of goods sold; (c) gross profits; (d) percentage of profits to gross sales; (e) amounts collected; and (f) gross profits on amounts collected.

COST OF GOODS SOLD

Lines 2-8.—If you are engaged in a trade or a business in which the production, purchase, or sale of merchandise is an income producing factor, you must take inventories of merchandise and materials on hand at the beginning and end of the taxable year in order to reflect the gross profits correctly. The usual methods of valuing inventory are (a) cost or (b) cost or market whichever is lower. The method properly adopted for the first year in which inventory is taken must be continued unless permission to change is secured from the Commissioner of Internal Revenue, Washington 25, D. C. Application for permission to change the method of valuing inventories must be made in writing and filed with the Commissioner within 90 days after the beginning of the taxable year in which it is desired to effect a change. You should enter the letters "C" or "C or M" immediately before the amount column if inventories are valued either at cost or at cost or market whichever is lower.

Other methods of valuing inventories of material or merchandise are provided for dealers in securities, for farmers, for miners, for manufacturers who produce more than one product from a single process, and for retail merchants using the "retail method."

A special method based on cost, LIFO, is allowable only if you file an application on Form 970 with your return for the first year used. The requirements for adopting and using the LIFO method are set forth on Form 970. Thereafter, you must attach a separate schedule showing: (a) a summary of all inventories; (b) with respect to inventories computed under the LIFO method, the computation of quantities and cost by acquisition levels.

OTHER BUSINESS DEDUCTIONS

Line 11—Salaries and Wages.—Enter all salaries and wages not included as "Cost of Labor" in "Cost of Goods Sold." Do not deduct any salary or wages for your own services or services of others not performed in connection with your business.

Line 12—Rent on Business Property.—Rents paid or accrued on business property in which you have no equity are deductible. Do not include rent for a building, or any part thereof, which you occupy solely for residential purposes.

Line 13—Interest on Business Indebtedness.—Interest on business indebtedness to others is deductible. Do not include interest to yourself on capital invested in or advanced to the business.

Line 15—Losses of Business Property.—You may deduct losses of business property by fire, storm, or other casualty, or theft, not compensated by insurance or otherwise and not made good by repairs claimed as a deduction. Attach a statement showing a description of the property, date acquired, cost, subsequent improvements, depreciation allowable since acquisition, insurance, salvage value, and deductible loss.

Line 16—Bad Debts Arising From Sales or Services.—Include debts, or portions thereof, arising from sales or professional services that have been included in income, which have been definitely ascertained to be worthless; or such reasonable amount as has been added within the taxable year to a reserve for bad debts. A debt which is deducted as bad and which reduces your tax must, if subsequently collected, be returned as income for the year in which collected.

Line 17—Depreciation and Obsolescence.—You may deduct a reasonable allowance for exhaustion, wear and tear, and obsolescence of property used in the trade or business. For additional information regarding depreciation, especially on new property acquired or constructed after December 31, 1953, see depreciation section in the instructions for Form 1040.

If a deduction is claimed on account of depreciation, fill in Schedule C-1. In case obsolescence is included, state separately amount claimed and basis upon which it is computed. The value or cost of land must not be included in this schedule, and where land and buildings were purchased for a lump sum, the cost of the building subject to depreciation must be established. The adjusted property accounts and the accumulated depreciation shown in the schedule should be reconciled with those accounts as reflected on your books.

Line 18—Repairs.—You may deduct the cost of incidental repairs, including labor, supplies, and other items, which do not add to the value or appreciably prolong the life of the property. Expenditures for new buildings, machinery, and equipment, or for permanent improvements or betterments which increase the value of the property are chargeable to capital accounts. Expenditures for restoring or replacing property are not deductible, since such expenditures are chargeable to capital accounts or to depreciation reserve depending on how depreciation is charged on your books.

Line 19—Depletion of Mines, Oil and Gas Wells, Timber, Etc.—If a deduction is claimed on account of depletion, procure from your District Director Form M (mines and other natural deposits), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with questionnaire in previous years, then file with your return information necessary to bring depletion schedule up to date, setting forth in full a statement of all transactions bearing on deductions from or additions to value of physical assets during the taxable year with explanation of how depletion deduction for the taxable year has been determined. (See sections 615 and 616 of the Internal Revenue Code of 1954 for election to capitalize or deduct expenditures for exploration and development of mineral properties.)

Line 20—Amortization.—If you elect the deduction with respect to the amortization of the adjusted basis of (a) any emergency facility with respect to which the Government has issued a certificate of necessity, or (b) a grain storage facility, a statement of the pertinent facts should be filed with your return. (See sections 168 and 169 of the Internal Revenue Code of 1954.)

For the election to amortize research or experimental expenditures not subject to depreciation or depletion, see section 174 of the Code.

For the election to amortize trademark or tradename expenditures, see section 177 of the Code.

Line 21—Other Business Expenses.—Include all ordinary and necessary business expenses for which no space is provided in the schedule. Any deduction claimed should be explained in Schedule C-2. Do not include cost of business equipment or furniture, expenditures for replacements, or for permanent improvements to property, or personal living and family expenses.

Net Operating Loss Deduction.—Any net operating loss deduction should be applied as an adjustment of the amount shown on line 11, page 1, Form 1040. See instructions for Form 1040 and attach statement.

ms—16—72767-2

Your social security number	Occupation	Wife's social security number	Occupation
325 18 2269	SALESMAN	487 18 0837	TEACHER

If Income Was All From Salaries and Wages, Use Pages 1 and 2 Only. See Page 3 of the Instructions.

Exemptions

1. Check blocks which apply. Check for wife if she had no income or her income is included in this return.
   - (a) Regular $600 exemption ..... ☒ Yourself ☒ Wife
   - (b) Additional $600 exemption if 65 or over at end of taxable year ☐ Yourself ☐ Wife
   - (c) Additional $600 exemption if blind at end of taxable year ☐ Yourself ☐ Wife

   Enter number of exemptions checked → 2
2. List first names of your children who qualify as dependents; give address if different from yours. TANYA MARIA SANSONE, ANTHONY SANSONE — Enter number of children listed → 2
3. Enter number of exemptions claimed for other persons listed at top of page 2 1
4. Enter the total number of exemptions claimed on lines 1, 2, and 3 5

Income

5. Enter all wages, salaries, bonuses, commissions, tips, and other compensation received in 1957, before payroll deductions.

Employer's Name	Where Employed (City and State)	(a) Wages, etc.	(b) Income Tax Withheld
BOARD OF EDUCATION	ST. LOUIS, MO	$ 4,760 00	$ 856 80
DEPT AIR FORCE	SCOTT AFB ILL	904 77	
		130 48	3 60
		130 48	3 60
	Enter totals here →	$ 5925 73	$ 863 60

6. Less: (a) Travel, reimbursed expenses, etc. (See instructions, page 6. Attach required statements.) $
   (b) Excludable "Sick Pay" in line 5
7. Balance (line 5 less line 6) ..... $ 5925 73
8. Profit (or loss) from business from separate Schedule C ..... ♦ 1,659 82
9. Profit (or loss) from farming from separate Schedule F ..... ♦
10. Other income (or loss) from page 3 (dividends, interest, rents, pensions, etc.) ..... ♦
11. ADJUSTED GROSS INCOME (sum of lines 7, 8, 9, and 10) ..... ♦ $ 7,585 55

If social security tax (FICA) withheld from your wages exceeded $94.50, see instructions, page 5.

Unmarried or legally separated persons qualifying as "Head of Household," see instructions, page 7, and check here ☐ | Widows and widowers who are entitled to the special tax computation, see instructions, page 7, and check here ☐

Tax due or refund

12. Tax on income on line 11. (If line 11 is under $5,000, and you do not itemize deductions, use Tax Table on page 16 of instructions to find your tax and check here ☐. If line 11 is $5,000 or more, or if you itemize deductions, compute your tax on page 2 and enter here the amount from line 9, page 2) $ 592 79

If income was all from wages, omit lines 13 through 28

13. (a) Dividends received credit from line 5 of Schedule J ..... $
    (b) Retirement income credit from line 12 of Schedule K .....
14. Balance (line 12 less line 13) ..... $ 592 79
15. Enter your self-employment tax from separate Schedule C or F 56 02
16. Sum of lines 14 and 15 ..... $ 648 81
17. (a) Tax withheld (line 5 above). Attach Forms W-2 (Copy B) ..... $ 863 60
    (b) Payments and credits on 1957 Declaration of Estimated Tax (See page 2, instructions) ♦ 1 00 $ 864 60
    District Director's office where paid .....
18. If your tax (line 12 or 16) is larger than your payments (line 17), enter the balance due here → $
    Pay in full with this return to "Internal Revenue Service." If less than $1.00, this return without payment.
19. If your payments (line 17) are larger than your tax (line 12 or 16) $ 215 79
    If less than $1.00, this overpayment will be refunded only upon specific request. See instructions, page 2.
20. Amount of line 19 to be: (a) Credited on 1958 estimated tax $ 1.00 (b) Refunded $ 214.79

County in which you live: ST. LOUIS, MO

Is your wife (husband) making a separate return for 1957? ☐ Yes ☒ No If "Yes," enter her (his) name.

Were you ever a citizen of any foreign country? ☐ Yes ☒ No

TAXPAYER—I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Sign here: Richard C. Sansone (Your signature) (Date) — Helen M. Sansone (If this is a joint return, wife's signature) 4-14-58 (Date)

→ To assure split-income benefits, husband and wife must include all their income and, even though only one has income, BOTH MUST SIGN.

PREPARER (other than taxpayer)—I declare under the penalties of perjury that I prepared this return for the person(s) named herein, and that this return (including any accompanying schedules and statements) is, to the best of my knowledge and belief, a true, correct, and complete return based on all the information relating to the matters required to be reported in this return of which I have any knowledge.

Sign here: Edith L. McDonnell (Individual or Firm Signature) — U.S.D. of Labor (Address) Fargo 21, Mo. (Date) 4/14/58

Form 1040—1957 **EXEMPTIONS FOR PERSONS OTHER THAN YOUR W[illegible] AND CHILDREN** Page 2

Name	Relationship	Number of months dependent lived in your home. If born or died during year also write "B" or "D"	Did dependent have gross income of $600 or more?	Amount YOU spent for dependent's support. If 10[illegible] write "All"	Amount contributed by OTHERS for dependent's support. (Explain if "Nothing" or "Own funds")
MITRA MILOSEVICH	MOTHER	12	NO	$ ALL	$ NONE

Enter on line 3, page 1, the number of exemptions claimed above.

⇒ If an exemption is based on a multiple-support agreement of a group of persons, attach information described on page 5 of instructions.

ITEMIZED DEDUCTIONS—IF YOU DO NOT USE TAX TABLE OR STANDARD DEDUCTION

If Husband and Wife (Not Legally Separated) File Separate Returns and One Itemizes Deductions, the Other Must Also Itemize

State to whom paid. If necessary write more than one item on a line or attach additional sheets. Please put your name and address on any attachments

Contributions

SCHEDULE ATTACHED

Total paid but not to exceed 20% of line 11, page 1, except as described on page 8 of instructions ... $ 137 90

Interest

SCHEDULE ATTACHED

Total interest 631 35

Taxes

SCHEDULE ATTACHED

Total taxes 735 30

Medical and dental expense (If 65 or over, see instructions, page 9)

Subm. I demand list. Do not enter any expense compensated by insurance or otherwise.

1. Cost of medicines and drugs, in excess of 1 percent of line 11, page 1	$ 132.71	
2. Other medical and dental expenses	198.00	
3. Total	$ 330.71	
4. Enter 3 percent of line 11, page 1	223.65	
5. Allowable amount (excess of line 3 over line 4). (See instructions, page 10, for limitations)		107 06

Other deductions (Including child care and casualty losses)

Enter child care expenses paid but not to exceed $600. Enter casualty losses which are not compensated by insurance or otherwise.

See page 10 of instructions and attach information required

EDUCATIONAL ASSN DUES 10 00

Total 10 00

TOTAL DEDUCTIONS (Enter here and on line 2 of Tax Computation, below) ... $ 1621 61

TAX COMPUTATION—IF YOU DO NOT USE THE TAX TABLE

1. Enter Adjusted Gross Income from line 11, page 1	$ 7585 55
2. If deductions are itemized above, enter total of such deductions. If deductions are not itemized *and line 1, above, is* **$5,000 or more:** (a) a married person filing separately enter $500; (b) all others enter 10 percent of line 1, or $1,000, whichever is smaller	1621 61
3 Balance (line 1 less line 2)	$ 5963 94
4 [illegible]	3 000 00

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MITRA MILOSEVICH	MOTHER		IV	IVC	ALL	NONE

Enter on line 3, page 1, the number of exemptions claimed above.
→ If an exemption is based on a multiple-support agreement of a group of persons, attach information described on page 5 of instructions.

ITEMIZED DEDUCTIONS—IF YOU DO NOT USE TAX TABLE OR STANDARD DEDUCTION

If Husband and Wife (Not Legally Separated) File Separate Returns and One Itemizes Deductions, the Other Must Also Itemize

State to whom paid. If necessary write more than one item on a line or attach additional sheets. Please put your name and address on any attachments.

Contributions

SCHEDULE ATTACHED

Total paid but not to exceed 20% of line 11, page 1, except as described on page 8 of instructions ... $ 13790

Interest

SCHEDULE ATTACHED

Total interest ... 63135

Taxes

SCHEDULE ATTACHED

Total taxes ... 73530

Medical and dental expense

(If 65 or over, see instructions, page 9)

Subtract itemized list. Do not enter any expense compensated by insurance or otherwise.

1. Cost of medicines and drugs, in excess of 1 percent of line 11, page 1	$ 132.71	
2. Other medical and dental expenses	198.00	
3. Total	$ 330.71	
4. Enter 3 percent of line 11, page 1	223.65	
5. Allowable amount (excess of line 3 over line 4). (See instructions, page 10, for limitations)		107.06

Other Deductions

(Including child care and casualty losses)

Enter child care expenses paid but not to exceed $600. Enter casualty losses which are not compensated by insurance or otherwise. See page 10 of instructions and attach information required.

EDUCATIONAL ASSN DUES 10.00

Total ... 10.00

TOTAL DEDUCTIONS (Enter here and on line 2 of Tax Computation, below) ... $ 162161

TAX COMPUTATION—IF YOU DO NOT USE THE TAX TABLE

1. Enter Adjusted Gross Income from line 11, page 1	$ 7585 55
2. If deductions are itemized above, enter total of such deductions. If deductions are not itemized *and line 1, above, is* **$5,000 or more:** (a) a married person filing separately enter $500; (b) all others enter 10 percent of line 1, or $1,000, whichever is smaller	162161
3. Balance (line 1 less line 2)	596394
4. Multiply $600 by total number of exemptions claimed on line 4, page 1	3 000 00
5. TAXABLE INCOME (line 3 less line 4)	2,963 94
6. Tax on amount on line 5. Use appropriate Tax Rate Schedule on page 11 of instructions	592 79
7. If you had capital gains and the alternative tax applies, enter the tax from separate Schedule D	
8. Tax credits. If you itemized deductions, enter: (a) Credit for income tax payments to a foreign country or U. S. possession (Attach Form 1116) $; (b) Tax paid at source on tax-free covenant bond interest and credit for partially tax-exempt interest. Enter total →	
9. Enter here and on line 12, page 1, the amount shown on line 6 or 7 less amount claimed on line 8	$ 592 79

Form 10—7353 1 .GPO

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MICHAEL C. AND HELEN SANSONE
CALENDAR YEAR 1957

CONTRIBUTIONS

ST. ROCH'S MOTHERS	3.50
CRIPPLED CHILDREN	2.00
ST. DOMENICO ORPHANS	4.00
CLAYTON FIREMEN	2.40
ST. ROCH'S MOTHERS	8.00
DISABLED VET'S	1.00
FATHER FLANAGAN	2.00
T.B. SOCIETY	2.00
UNITED FUND	25.00
MUSCULAR DYSTROPHY	2.00
ST. ROCH'S CHURCH	75.00
ST. PATRICK'S	10.00
ST. FABIAN CHURCH	1.00
	$137.90

MEDICAL

DR EMERSON	$10.00
DR ROSS	102.00
DR RITCHIE	86.00
	$198.00

MEDICINES AND DRUGS

FELDBERG'S + DRUG	$207.26
LESS 10%	74.55
	$132.71

TAXES

PERSONAL PROPERTY	$64.35
PARK VIEW	60.50
REAL ESTATE	451.45
AUTO LICENSES	44.00
GAS TAX - PERSONAL PORTION	12.00
SALES TAX	74.55
MISSOURI INCOME	4.65
CITY EARNINGS	23.80
	$735.30

INTEREST

ST. LOUIS COUNTY NATL BANK	$84.35
VETERANS ADMIN.	30.07
GEN. AMER. LIFE	9.07
LINCOLN NATL LIFE	12.50
N.W. MUTUAL.	400.32
AUTO CLUB ACCEPT CORP.	95.04
	$631.35

SCHEDULE C (Form 1040)

J. S. Treasury Department—Internal Revenue Service

PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION

(For Computation of Self-Employment Tax, see Page 3)

1957

Attach this schedule to your Income Tax Return, Form 1040 — Partnerships, Joint Ventures, Etc. Must File On Form 1065

For Calendar Year 1957, or other taxable year beginning , 1957, and ending , 19

Name and Address as shown on page 1, Form 1040

MICHAEL C. SANSONE 6331 PERSHING U. CITY 5, MO.

A. Principal business activity (See instructions, page 3): SECURITIES SALESMAN (Retail trade, wholesale trade, lawyer, etc.) — SECURITIES (Principal product or service)

B. Business name: MICHAEL C. SANSONE

C. Business address: 409 N. 8TH ST. (Number and street or rural route) ST. LOUIS (City or post office) 1, MO. (State)

● REPORTING—If you had more than one business, a separate page 1 of Schedule C must be completed for each business

1. Total receipts $ ..., less allowances, rebates, and returns $ ...			$ 3,202 98
2. Inventory at beginning of year	$		
3. Merchandise purchased $ ..., less any items withdrawn from business for personal use $			
4. Cost of labor (do not include salary paid to yourself)			
5. Material and supplies			
6. Other costs (explain in Schedule C-2)			
7. Total of lines 2 through 6	$		
8. Inventory at end of year			
9. Cost of goods sold (line 7 less line 8)			
10. Gross profit (line 1 less line 9)			$ 3,202 98
OTHER BUSINESS DEDUCTIONS			
11. Salaries and wages not included on line 4 (do not include any paid to yourself)	$		
12. Rent on business property			
13. Interest on business indebtedness			
14. Taxes on business and business property			
15. Losses of business property (attach statement)			
16. Bad debts arising from sales or services			
17. Depreciation (explain in Schedule C-1)		618.75	
18. Repairs (explain in Schedule C-2)			
19. Depletion of mines, oil and gas wells, timber, etc. (attach schedule)			
20. Amortization (attach statement)			
21. Other business expenses (explain in Schedule C-2)		924.41	
22. Total of lines 11 through 21			1,543 16
23. Net profit (or loss) (line 10 less line 22). Enter here, on line 24, page 3, and on line 8, page 1, Form 1040			$ 1,659 82

Schedule C-1. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON LINE 17

1 Kind of property (if buildings, state material of which constructed). Exclude land and other nondepreciable property	2 Date acquired	3 Cost or other basis	4 Depreciation allowed (or allowable) in prior years	5 Method of computing depreciation	6 Rate (%) or life (years)	7 Depreciation for this year
1953 CADILLAC	2-1-54	$ 3100.00	$ 2217.19	S/L	4 YR.	$ 825.00
			LESS 25%	PERSONAL		206.25
						618.75

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(For Computation of Self-Employment Tax, see Page 3)

Attach this schedule to your Income Tax Return, Form 1040 — Partnerships, Joint Ventures, Etc. Must File On Form 1065

For Calendar Year 1957, or other taxable year beginning , 1957, and ending , 19

Name and Address as shown on page 1, Form 1040

MICHAEL C. SANSONE 6331 PERSHING U. CITY 5, MO.

A. Principal business activity (See instructions, page 3): SECURITIES SALESMAN (Retail trade, wholesale trade, lawyer, etc.) — SECURITIES (Principal product or service)

B. Business name: MICHAEL C. SANSONE

C. Business address: 409 N. 8th ST. (Number and street or rural route) ST. LOUIS (City or post office) 1, MO. (State)

● INSTRUCTIONS—If you had more than one business, a separate page 1 of Schedule C must be completed for each business

1. Total receipts $ ..... less allowances, rebates, and returns $			$ 3,202.98
2. Inventory at beginning of year	$		
3. Merchandise purchased $ ....., less any items withdrawn from business for personal use $			
4. Cost of labor (do not include salary paid to yourself)			
5. Material and supplies			
6. Other costs (explain in Schedule C-3)			
7. Total of lines 2 through 6	$		
8. Inventory at end of year			
9. Cost of goods sold (line 7 less line 8)			
10. Gross profit (line 1 less line 9)			$ 3,202.98
OTHER BUSINESS DEDUCTIONS			
11. Salaries and wages not included on line 4 (do not include any paid to yourself)	$		
12. Rent on business property			
13. Interest on business indebtedness			
14. Taxes on business and business property			
15. Losses of business property (attach statement)			
16. Bad debts arising from sales or services			
17. Depreciation (explain in Schedule C-1)		618.75	
18. Repairs (explain in Schedule C-2)			
19. Depletion of mines, oil and gas wells, timber, etc. (attach schedule)			
20. Amortization (attach statement)			
21. Other business expenses (explain in Schedule C-2)		924.41	
22. Total of lines 11 through 21			1,543.16
23. Net profit (or loss) (line 10 less line 22) Enter here, on line 24, page 3, and on line 8, page 1, Form 1040			$ 1,659.82

Schedule C-1. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON LINE 17

1. Kind of property (if buildings, state material of which constructed). Exclude land and other nondepreciable property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed (or allowable) in prior years	5. Method of computing depreciation	6. Rate (%) or life (years)	7. Depreciation for this year
1953 CADILLAC	2-1-54	$ 3100.00	$ 2217.19	S/L	4 YR.	$ 825.00
			LESS 25%	PERSONAL		206.25
						618.75

Schedule C-2. EXPLANATION OF LINES 6, 18, AND 21

Line No.	Explanation	Amount	Line No.	Explanation	Amount
		$			$
	SCHEDULE ATTACHED.				

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C

If you owned a business, or practiced a profession, you must fill in separate Schedule C on other side and enter the net profit (or loss) on line 8, page 1, Form 1040

Separate Schedule C should include income from (1) sale of merchandise, or products of manufacturing, mining, and construction; (2) business service; and (3) professional service. In general, you should report any income in the earning of which you have incurred expenses for material, labor, supplies, and the like.

All farmers should use separate Schedule F (Form 1040) to report their farm income whether reporting on the cash or accrual method.

Item A—Business Activity.—State the general classification of business activity, as well as the principal product or service. For example, "Wholesale food," "Retail men's apparel," "Manufacture of upholstered wooden household furniture," "Transportation by truck," "Broker, real estate," "Contractor—carpenter work," "Physician," etc. Do not use such terms as "partnership," "owner," "student," etc. The "principal business activity" is the one which accounts for the largest percentage of your total receipts. All trades and businesses except those specifically excluded are subject to self-employment tax.

Item C—Business Address.—Do not use home address as business address unless business is actually conducted from home.

Line 1—Total Receipts.—Include all income derived from your trade or business. Enter in the space provided such items as returned sales, rebates, and allowances from the sale price or service charge.

If you have dividend income from stocks held by you in the ordinary course of carrying on your trade or business, such dividends must be considered together with your dividends from stocks regularly held for investment purposes in computing your dividend exclusion and credit on pages 3 and 4, Form 1040.

Installment Sales.—If you use the installment method of reporting income from sales, you must attach to your return a schedule showing separately for the years 1954, 1955, 1956, and 1957 the following: (a) Gross sales; (b) cost of goods sold; (c) gross profits; (d) percentage of profits to gross sales; (e) amounts collected; and (f) gross profits on amounts collected.

COST OF GOODS SOLD

Lines 2-6.—If you are engaged in a trade or a business in which the production, purchase, or sale of merchandise is an income producing factor, you must take inventories of merchandise and materials on hand at the beginning and end of the taxable year in order to reflect the gross profits correctly. The usual methods of valuing inventory are (a) cost or (b) cost or market whichever is lower. The method properly adopted for the first year in which inventory is taken must be continued unless permission to change is secured from the Commissioner of Internal Revenue, Washington 25, D. C. Application for permission to change the method of valuing inventories must be made in writing and filed with the Commissioner within 90 days after the beginning of the taxable year in which it is desired to effect a change. You should enter the letters "C" or "C or M" immediately before the amount column if inventories are valued either at cost or at cost or market whichever is lower.

Other methods of valuing inventories of material or merchandise are provided for dealers in securities, for farmers, for miners, for manufacturers who produce more than one product from a single process, and for retail merchants using the "retail method."

A special method based on cost, LIFO, is allowable only if you file an application on Form 970 with your return for the first year used. The requirements for adopting and using the LIFO method are set forth on Form 970. Thereafter, you must attach a separate schedule showing: (a) a summary of all inventories; (b) with respect to inventories computed under the LIFO method, the computation of quantities and cost by acquisition levels.

Line 14—Taxes on Business and Business Property.—Include taxes paid or accrued on business property or incurred in carrying on your business. Federal import duties and Federal excise and stamp taxes are deductible if paid or incurred in carrying on a trade or business. Do not include taxes assessed against local benefits of a kind tending to increase the value of the property assessed, as for paving, sewers, front foot benefits, etc.

Line 15—Losses of Business Property.—You may deduct losses of business property by fire, storm, or other casualty, or theft, not compensated by insurance or otherwise and not made good by repairs claimed as a deduction. Attach a statement showing a description of the property, date acquired, cost, subsequent improvements, depreciation allowable since acquisition, insurance, salvage value, and deductible loss.

Line 16—Bad Debts Arising From Sales or Services.—Include debts, or portions thereof, arising from sales or professional services that have been included in income, which have been definitely ascertained to be worthless; or such reasonable amount as has been added within the taxable year to a reserve for bad debts. A debt which is deducted as bad and which reduces your tax must, if subsequently collected, be returned as income for the year in which collected.

Line 17—Depreciation and Obsolescence.—You may deduct a reasonable allowance for exhaustion, wear and tear, and obsolescence of property used in the trade or business. For additional information regarding depreciation, especially on new property acquired or constructed after December 31, 1953, see depreciation section in the instructions for Form 1040.

If a deduction is claimed on account of depreciation, fill in Schedule C-1. In case obsolescence is included, state separately amount claimed and basis upon which it is computed. The value or cost of land must not be included in this schedule, and where land and buildings were purchased for a lump sum, the cost of the building subject to depreciation must be established. The adjusted property accounts and the accumulated depreciation shown in the schedule should be reconciled with those accounts as reflected on your books.

Line 18—Repairs.—You may deduct the cost of incidental repairs, including labor, supplies, and other items, which do not add to the value or appreciably prolong the life of the property. Expenditures for new buildings, machinery, and equipment, or for permanent improvements or betterments which increase the value of the property are chargeable to capital accounts. Expenditures for restoring or replacing property are not deductible, since such expenditures are chargeable to capital accounts or to depreciation reserve depending on how depreciation is charged on your books.

Line 19—Depletion of Mines, Oil and Gas Wells, Timber, Etc.—If a deduction is claimed on account of depletion, procure from your District Director Form M (mines and other natural deposits), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with questionnaire in previous years, then file with your return information necessary to bring depletion schedule up to date, setting forth in full a statement of all transactions bearing on deductions from or additions to value of physical assets during the taxable year with explanation of how depletion deduction for the taxable year has been determined. (See sections 615 and 616 of the Internal Revenue Code of 1954 for election to capitalize or deduct expenditures for exploration and development of mineral properties.)

Line 20—Amortization.—If you elect the deduction with respect to the amortization of the adjusted basis of (a) any emergency facility with respect to which the Government has issued a certificate of necessity, or (b) a grain storage facility, a statement of the pertinent facts should be filed with your return. (See sections 168 and 169 of the Internal Revenue Code of 1954.)

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MICHAEL C. SANSONE
CALENDAR YEAR 1957

AUTO EXPENSE

GAS, OIL, GREASE, & ANTI-FREEZE		$ 534.18
AUTO CLUB		15.00
PARKING AND WASH		95.00
INSURANCE		114.56
REPAIRS		93.64
		$ 852.38
LESS 25% PERSONAL		213.09
		$ 639.29

HOME OFFICE

HEAT & ELECTRIC	$ 586.09	
LESS 90% PERSONAL	527.48	58.61
TELEPHONE	$ 107.52	
LESS 50% PERSONAL	53.76	53.76
PROMOTION AND ENTERTAINMENT		172.75
		$ 924.41

COMPUTATION OF SELF-EMPLOYMENT TAX
(For social security)
(See Instructions—Page 4)

▶ Each self-employed person must file a separate schedule. See Instructions, page 4, for joint returns and partnerships.
▶ If you had wages of $4,200 or more which were subject to the deduction for social security, do not fill in this page.
▶ If you have more than one business, a separate page 1, Schedule C, must be completed for each business. However, only one page 3 is to be completed and filed showing the combined net profit or loss from such businesses.

NAME OF SELF-EMPLOYED PERSON (as shown on social security card)

MICHAEL E. SANSONE

STATE EACH BUSINESS ACTIVITY SUBJECT TO SELF-EMPLOYMENT TAX (for example: Restaurant, Building Contractor, but not Partner or Owner)

SECURITIES SALESMAN.

Line				
24. Net profit (or loss) shown on line 23, page 1 (Enter combined amount if more than one business)	$ 1,659	82		
25. Add to net profit (or subtract from net loss) losses of business property shown on line 15, page 1				
26. Total (or difference)			$ 1,659	82
27. Net income (or loss) from excluded services or sources included on line 26				
Specify excluded services or sources				
28. Net earnings (or loss) from self-employment—				
(a) From business (line 26 less any amount on line 27)			$ 1,659	82
(b) From partnerships, joint ventures, etc. (other than farming)				
(c) From service as a minister, member of a religious order, or a Christian Science practitioner. Enter only if you elect Social Security coverage by filing Form 2031 (See instructions, page 4)				
(d) From farming reported on line 12 or 13, separate Schedule F (Form 1040)				
29. Total net earnings (or loss) from self-employment reported on line 28			$ 1,659	82
(If line 29 is under $400, you are not subject to self-employment tax. Do not fill in rest of page.)				
30. Maximum amount subject to self-employment tax	$ 4,200	00		
31. Less: Total wages subject to deduction for social security paid to you during the taxable year. (For wages reported on Form W-2, see "F. I. C. A. Wages" box.)	—0	—		
32. Balance (line 30 less line 31)	$ 4,200	00		
33. Self-employment income—line 29 or 32, whichever is smaller			$ 1,659	82
34. Self-employment tax—take 3⅛% of the amount on line 33. (You can do this by multiplying the amount on line 33 by .03375.) Enter this amount here and on line 15, page 1, Form 1040			$ 56	02

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No deductions for personal exemptions.—The deductions for personal exemptions are not allowable in determining net earnings from self-employment.

Farm income.—Farmers should report their farm income and compute their net income from self-employment from farming on separate Schedule F (Form 1040).

EXCLUSIONS

Income (or loss) from the following sources and deductions attributable thereto are not taken into account in figuring net earnings from self-employment. Use line 27 to exclude any such amounts reported on page 1 that should not be taken into account in figuring your self-employment income.

Doctors of medicine.—Income from the performance of service as a doctor of medicine or income from the performance of such service by a partnership.

Christian Science practitioners.—Income from the performance of service as a Christian Science practitioner, unless such Christian Science practitioner elects by filing Form 2031 to be covered by the Social Security Act, as explained above.

Religious services.—Income from the performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, unless such minister or member of a religious order elects by filing Form 2031 to be covered by the Social Security Act, as explained above.

Employees and public officials.—Income from the performance of service as:

(a) a public official, including a notary public;

(b) an employee or employee representative under the railroad retirement system; or

(c) an employee.

Note.—The income of an employee over the age of 18 from the sale of newspapers or magazines to an ultimate consumer is subject to the self-employment tax if the income consists of retained profits from such sales.

Real estate rentals.—Rentals from real estate, except rentals received in the course of a trade or business as a real estate dealer. This includes cash and crop shares received from a tenant or sharefarmer. These amounts should be reported in Schedule G of Form 1040. However, rental income from a farm is not excluded if the rental arrangement provides for material participation by the landlord and he does participate materially in the production or in the management of the production of farm products on his land. Such income represents farm earnings and should be reported on separate Schedule F (Form 1040).

Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as rooms in hotels, boarding houses, apartment houses furnishing hotel services, tourist camps, tourist homes, or space in parking lots, warehouses, or storage garages do not constitute rentals from real estate and, therefore, are included in determining net earnings from self-employment.

JOINT RETURNS

Where husband and wife file a joint income tax return, page 3 of Schedule C (Form 1040) should show the name of the one with self-employment income. Where husband and wife each have self-employment income, a separate Schedule C must be attached for each. In such cases the total of amounts shown on line 23 of each separate schedule should be entered on line 8, page 1, Form 1040, and the aggregate self-employment tax (line 34) should be entered on line 15, page 1, Form 1040.

COMMUNITY INCOME

For the purpose of computing net earnings from self-employment, if any of the income from a trade or business is community income, all the income from such trade or business is considered the income of the husband unless the wife exercises substantially all the management and control of the trade or business, in which case all of such income is considered the income of the wife.

If separate income tax returns are filed by husband and wife, a complete Schedule C should be attached to the return of the one with self-employment income. Community income included on such a schedule must, however, be allocated between the two returns (on line 8, page 1, Form 1040) on the basis of the community property laws.

Partnerships.—In computing his combined net earnings from self-employment, a partner should include his entire share of such earnings from a partnership including any guaranteed payments. No part of that share may be attributed to the partner's wife (or husband) even though the income may, under State law, be community income. In the case of a husband and wife partnership, like other partnerships, the distributive share of each should be entered in Schedule H, page 3 of Form 1040, for income tax purposes. For self-employment tax purposes the distributive share of each partner should be entered on line 28(b), page 3, of this form (except that farm partnership earnings are to be reported on line 11(b), separate Schedule F (Form 1040) rather than on line 28(b) of this schedule).

SCHEDULE SE (Form 1040)

This schedule provides the Social Security Administration with the information on self-employment income necessary for computing benefits under the social security program.

To assure proper credit to your account, be sure to enter your name and social security account number on Schedule SE (Form 1040) exactly as they are shown on your social security card. If you do not have a social security account number, you must get one. These account numbers are obtainable from any of the approximately 600 Social Security Administration offices throughout the country. The telephone directory or your local post office will give you the address. Do not delay filing your return beyond the due date.

Regardless of whether joint or separate returns, Form 1040, are filed by husband and wife, **Schedule SE** (Form 1040) must show only the name of the one with the self-employment income. If both had net earnings from self-employment, a separate Schedule SE must be filed by each.

U. S. GOVERNMENT PRINTING OFFICE : 1951—O-921650

16—73767-2

[fol. 365] Clerk's Certificate to foregoing exhibit (omitted in printing).

[fol. 366] Clerk's Note: Stipulation of counsel, filed July 1, 1963, is omitted in printing. It appears at side folio 9, *supra*.

[fol. 367] [File endorsement omitted]

In United States District Court

Eastern District of Missouri

Eastern Division

[Title omitted]

Judgment of Acquittal as to Count I—July 3, 1963

The jury this day having returned its verdict finding defendant not guilty as charged in Count One of Indictment herein, it is, in accordance therewith,

Now Ordered, Adjudged and Decreed That Defendant Sansone be and he hereby is discharged under said Count One to go hence without day.

Dated at St. Louis, Mo., this 3rd day of July, 1963.

Roy W. Harper, Judge, United States District Court.

[fol. 368] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

VERDICT—July 3, 1963

We, the jury in the above entitled cause, on the trial of the Indictment herein find as follows:

We find the Defendant Not Guilty as charged in Count One of the Indictment.

We find the Defendant Guilty as charged in Count Two of the Indictment.

Harold F. Clark, Foreman.

[fol. 369] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL—Filed July 11, 1963

Comes now the defendant in the above captioned matter and respectfully moves for a judgment of acquittal, or in the alternative for a new trial, and as ground for said motion states:

1. That all of the evidence adduced at the trial failed to make a prima facie case of a violation of Section 7201, Title 26 U.S. Code because the prosecution failed to prove by

independent evidence the requisite specific intent to support the crime charged and (as a matter of law) failed sufficiently to corroborate defendant's admissions of May 5, 1960 so as to enable said admissions to support a judgment of conviction by establishing the essential element of defendant's *scienter*.

Stanley M. Rosenblum, Thomas A. Wadden, Attorneys for Defendant.

Proof of Service (omitted in printing).

[fol. 370] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL OR FOR NEW TRIAL—July 19, 1963

The Court having before it the defendant's Motion for Judgment of Acquittal or in the alternative for a New Trial, and having fully considered the premises, it is hereby

Ordered that said motion is denied and overruled in all particulars.

Roy W. Harper, United States District Judge.

[fol. 371]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

MICHAEL C. SANSONE.

No. 63 Cr 36(1)

JUDGMENT AND COMMITMENT—July 19, 1963

On this 19th day of July, 1963, came the attorney for the government and the defendant appeared in person and with Stanley Rosenblum, his attorney.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, entered February 11, 1963, and jury verdict of guilty, filed July 3, 1963, of the offense of willfully and knowingly attempting to evade and defeat a large part of the income tax due the U.S. of A., by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis District, a false and fraudulent joint income tax return for the calendar year 1957; In violation of Section 7201, T. 26 U.S. Code, as charged in Count Two of Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Fifteen (15) Months as to and under the charge contained in Count

Two of Indictment; punishment of defendant is further fixed at a fine of $2,000.00, and defendant ordered to pay court costs totalling $73.44, said fine and costs to be collectible on execution, for which sum of Two Thousand Seventy-Three Dollars and Forty-Four Cents ($2073.44) let execution issue upon the filing of a praecipe therefor by the U.S. Attorney.

It Is Adjudged that defendant herein shall be and hereby is granted a stay of execution of within judgment and sentence until Friday, July 26, 1963.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Roy W. Harper, United States District Judge.

Harold G. Pryce, Clerk, (By) Ellen C. Donovan, Deputy Clerk.

[fol. 372] [File endorsement omitted]

In United States District Court

Eastern District of Missouri

Eastern Division

[Title omitted]

Notice of Appeal of Defendant Michael C. Sansone —Filed July 19, 1963

1. The name of appellant is Michael C. Sansone and appellant's address is 62 West Vernon, Phoenix, Arizona.

2. The names of appellant's attorneys are Stanley M. Rosenblum and Thomas A. Wadden, 818 Olive Street, Suite 430, St. Louis, Missouri.

3. The offense charged is the violation of Section 7201 Title 26 U.S. Code (one count).

4. The judgment and Order appealed from is the judgment of conviction and sentence dated July 19, 1963 as follows: 15 months imprisonment and $2,000.00 fine plus costs.

5. Appellant is at liberty on bond.

6. Appellant hereby appeals from the aforesaid judgment and sentence to the U.S. Court of Appeals for the Eighth Circuit.

Dated: July 19, 1963.

Stanley M. Rosenblum, Thomas A. Wadden, Attorneys for Appellant.

[fol. 373]

IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Criminal Docket

No. 63 Cr. 36(1)

THE UNITED STATES,

vs.

MICHAEL C. SANSONE.

DATE	PROCEEDINGS
1963	
Jan. 30	Indictment filed.
	Order filed fixing bond at $1,000; on praecipe of U.S. Attorney, warrant of arrest issued.
Feb. 11	Defendant Sansone appears with Stanley M. Rosenblum & Merle L. Silverstein, his attorneys, waives formal arraignment and enters plea of not guilty to each of counts 1 and 2 of Indictment.
	Defendant granted 15 days to file motions and any motions so filed to be heard on March 1, 1963. Cause set for trial on June 3, 1963.

DATE	PROCEEDINGS
1963	
Feb. 11	Bond of defendant Sansone in the sum of $1,000 returnable in Court One on June 3, 1963, filed. (Helen W. & Andrew Sansone, sureties)
Feb. 13	Marshal's return filed; warrant for arrest executed on defendant Sansone (released on $1,000 bond)
Feb. 26	Motion of defendant for discovery and inspection with supporting memo filed.
Mar. 1	Defendant's motion for discovery and inspection, taken as submitted by consent, and sustained. Plaintiff allowed 10 days to reply.
[fol. 374]	
April 19	Setting of June 3, 1963 vacated and cause reset for June 10, 1963: (all parties notified, J.M.)
May 22	Marshal's returns filed; subpoena to testify executed on Edw. W. Schuttner and Steve N. Milosevich Subpoenas to produce document etc., executed on Mrs. Muriel Novak, Stephen F. Thornton, Mrs. D. Cunningham, Al Ottoline, Raymond N. Grellner, Lewis Bald, Louis Sutfin, Frank T. Rauschenbach; subpoenas not executed on Walter Gottlieb and Herbert L. Shanks.
May 31	Setting of cause for trial on June 10, vacated and case reset for June 24, 1963. notice of resetting mailed to Stanley Rosenblum and U.S. Attorney, by Clerk
June 24	Reset for trial on June 26, 1963.
July 1	Stipulation relative to admissibility of certain facts and evidence filed. Parties announcing ready, jury is sworn and Mrs. Annie L. Carter is empaneled and sworn as alternate juror. Evidence on behalf of plaintiff commenced and further proceedings postponed until July 2, 1963, at 10 A.M.

DATE 1963	PROCEEDINGS
July 2	Again come parties, jury and alternate juror and evidence on behalf of plaintiff is resumed and concluded. Defendant's oral motion for judgment of acquittal at close of plaintiff's case made, submitted and overruled. Defendant's evidence commenced and concluded. Parties and jurors and alternate juror excused until July 3, at 10: A.M.
July 3	Jury trial resumed & plff's rebuttal evidence commenced & concluded. Deft's oral motion for judgment of acquittal at close of all evidence made, submitted & overruled. After arguments & charge, alternate juror excused & jury retires to consider its verdict. Verdict returned finding deft Not Guilty as charged in Count 1 and Guilty as charged in Count 2 of Indictment. Deft granted 10 days to file motions. Hearing of motions and imposition of sentence set for July 19. Judgt of Acquittal on Count 1 filed and entered.
July 11	Motion of deft for judg of acquittal, or, in alternative, for a new trial, with supporting brief, filed.
July 19	Deft appears with Stanley Rosenblum, his atty., for imposition of sentence under verdict heretofore returned by a jury finding deft guilty as charged in count 2 of indictment. Motion of deft for judgment of acquittal, or in alternative, for a new trial, heretofore filed is overruled. Deft sentenced to 15 months imprisonment under said count 2, & punishment of deft further fixed at a fine of $2000. & deft. ordered to pay the costs herein, collectible on execution. Deft granted stay of execution of aforesaid judgment & sentence until Friday, July 26. Appeal bond of deft. fixed at the sum of $2500. Judgment & Commitment filed & entered. Harper, J.

DATE	PROCEEDINGS
1963	
July 19	Notice of appeal of deft to U S Court of Appeals, 8th Circuit, from judgment & sentence entered herein against deft this day filed & duplicate of such Notice, together with certified copy of docket entries in cause forthwith transmitted to Clerk of aforesaid appellate ct. Duplicate of Notice mailed to U. S. Atty.
July 19	Bond of deft in sum of $2500. filed.
July 22	Plaintiff's cost bill filed. (73.44)
July 23	Designation of record on appeal filed.
[fol. 375]	
Aug. 29	Certified copy of order of USCA, 8th Cir., granting Clerk of U. S. District Ct to & including Sept. 30 in which to forward the original files & transcript of testimony in cause, filed.
Oct. 1	Certified copy of order of USCA, 8th Cir., granting Clerk of District Court to and including November 1, 1963, in which to forward transcript of testimony filed.
Nov. 5	Transcript of trial proceedings filed by Official Court Reporter.

[fol. 376] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 377] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 378]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,399

Appeal from the United States District Court for the Eastern District of Missouri.

MICHAEL C. SANSONE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

OPINION—July 17, 1964

Before: Vogel, Matthes and Blackmun, Circuit Judges.

BLACKMUN, *Circuit Judge*:

Michael C. Sansone, age 41, after a plea of not guilty, was convicted by a jury of a willful and knowing attempt, in violation of 26 U.S.C. § 7201, to evade and defeat his federal income tax for the calendar year 1957. He had been charged in a 2-count indictment with a violation of this statute for both 1956 and 1957 but was acquitted as to 1956. Judge Harper imposed a $2,000 fine and a 15-month sentenee. The defendant appealed.

The case comes down to the omission from Sansone's 1957 return of about $20,000 in long term capital gain [fol. 379] realized upon the disposition of real estate. That the gain was realized, that it was not reported, and that it should have been reported are conceded by the defense.

The issues are (A) whether the admissible evidence established the essential element of willfulness on the part of Sansone and (B) whether he was entitled to lesser-included-offense instructions. On the first issue the admissibility of an after-the-act affidavit executed by Sansone and given to an investigating intelligence agent assumes vital importance.

The objective facts are not in dispute. Sansone and his wife in 1956 and 1957 lived in a Saint Louis suburb. They filed joint returns for both years. Their 1957 return as filed showed adjusted gross income of $7,585 and taxable income of $2,963. The income reported consisted of Mrs. Sansone's salary as a teacher, sums received by Mr. Sansone from the Department of the Air Force, and his net income as a securities salesman. It was stipulated that the taxpayers earned and received these items in 1957. The return disclosed no capital gain or loss and no other income.

On December 6, 1955, Sansone obtained from House Hunters, Inc. an option to purchase certain land in Saint Louis County. In the following February he exercised this option and a contract for sale was signed. It ran from the vendor to the Sansones. It specified a price of $22,500, payable $17,500 in cash and $5,000 by a purchase money deed of trust on part of the real estate.

Sansone at the same time effected a sale of a portion of the land to D-X Sunray Oil Company for $20,000. Land Title Insurance Co. of St. Louis handled both Sansone's purchase and his sale to Sunray. It closed the two transactions simultaneously and issued the Sansones its check for $2,891.71. This was the amount remaining after ap- [fol. 380] propriate charges and after debiting the Sansones for their $22,500 purchase price and crediting them for the $20,000 Sunray proceeds plus the deed of trust obligation. Both deeds were filed for record on March 21, 1956. This Sunray transaction resulted in 1956 gain which was not reported and which was the subject of the first and acquitted count of the indictment.

In August 1957 Sansone sold another portion of his tract. This was to Tremarco Corporation and was for a gross price of $27,000. This time Land Title issued the Sansones its check for $21,671.67, representing the net payable to them after vendor's expenses and after payment of the amount due on the deed of trust. The deed to Tremarco was immediately recorded. This Tremarco transaction resulted in 1957 gain which was not reported and which was the subject of the second and convicted count of the indictment.

In summary and to repeat: The defendant purchased a tract of land in March 1956 for $22,500. He promptly sold a portion of the same land for $20,000. In 1957 he sold another portion for $27,000. The gains realized on these respective sales were not reported in the Sansone returns for 1956 and 1957.

On the question of willfulness the government's case rested primarily upon the testimony of Steve Milosevich, of Revenue Agent John J. Conley, and of the defendant himself, and upon Sansone's own written statement hereinafter mentioned. Because of the difficulty and sensitivity of the issue, we review this evidence in some detail.

Milosevich was Mrs. Sansone's brother. He operated a delicatessen-sandwich shop. He had had some experience as a junior accountant. He prepared the Sansones' 1956 and 1957 returns. He testified that at the time he pre- [fol. 381] pared the 1956 return he was "not sure" he had information that the Sansones "had a real estate transaction" but "I think at that time I may have been aware that there was" one. He also said that he prepared the 1957 return from work sheets presented to him by the taxpayers; that there was no information on those sheets pertaining to any real estate transaction other than real estate taxes paid; that again he was "not sure" whether he knew at the time he prepared the return that the Sansones had sold a piece of property; and that he learned about the real estate transaction through conversations with the Sansones, but that he did not "recall exactly when it was".

Conley was a special agent with the Intelligence Division. He and Agent Purk conferred with the Sansones in May 1960. They then lived in Phoenix, Arizona. The agents saw the defendant at his home on three successive days beginning May 3. On May 5 Conley took from the defendant a written statement subscribed and sworn to by Sansone before Conley and denominated an affidavit. This was prepared by Conley. It was admitted into evidence at the trial over objection. The statement twice recites that it was made voluntarily and goes on to state that the affiant understood it, that it was made without threat or promise of immunity, and that he had been

advised as to his constitutional rights. It further recites that the Sansones' returns for 1956 and 1957 (and for 1958) were prepared by Milosevich from work papers compiled by Mrs. Sansone, and

> "I did not report the 1956 sale in our 1956 joint income tax return because I thought that I was entitled to recover my entire cost before reporting any sales in my income tax returns. I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations [fol. 382] and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.
>
> "My brother-in-law, Steve Milosevich, knew that we had this real estate and had made several sales, but he did not advise us whether or not to report the 1956 and 1957 sales and the matter was not discussed with him as he merely prepared the returns from the workpaper we gave him in these years."

Conley testified that he adjusted the 1956 return to reflect the Sunray sale; that this was a short term capital gain; that he determined basis on the part sold by allocating to it a portion of the cost of the entire tract; that this allocation was based on assessed valuations approved by the Sansones on Land Title's closing statement; that he adjusted the 1957 return to include the long term capital gain on the sale to Tremarco; and that he used the assessed valuation method for determining basis of the Tremarco tract.

On cross-examination Conley testified that there are a number of approved methods for apportioning cost; that when Agent Purk made allocations for the later actual payment of the tax he used a method based on front footage; that the Sansones produced for the agents all

the documents they requested, and made a place available for them in which to work; that, apart from the omission of the sales in the returns, he found no evidence that the defendant attempted to conceal any part of these transactions; that the checks the Sansones received were deposited without concealment; that the affidavit did not cover all the discussions had with the Sansones; that they [fol. 383] discussed Fish Pot Creek which ran through the real estate; that, although the defendant was not present when the affidavit was typed, he had approved a rough draft and was given the opportunity to add anything he wished; that he examined the Sansones' bank statements; that their May 1958 statement showed a balance of $9,286.74; and that Sansone had said he wanted to pay his tax.

The defense for the 1957 case is largely concerned with Fish Pot Creek. This stream ran through the Sansone property west of the portions sold to Sunray and Tremarco. The claim is that Sansone was confronted with large capital expenditures required to correct conditions which the creek had created; that these expenditures would be far greater than any gain realized in the 1957 sale; that any meaningful development was necessarily delayed until the Missouri Highway Commission concluded its plans for improvements to Manchester Road which bordered the property at the south and under which the creek flowed; that Sansone honestly believed that he could wait until these expenditures were ascertained and then determine whether he had any gain on the entire tract; that, although he now knows this was erroneous, it nevertheless was an honest belief which he held when his returns were filed; and that he did not intend to avoid payment of any taxes.

In support of this defense Sansone himself took the stand. He testified that his own average income in 1954 through 1956 was around $3,000 to $3,200 annually; that he desired to supplement this by acquiring a piece of property to develop; that he first saw the land in question in the winter of 1955-56 when the creek did not appear unusual; that during that winter he learned of the Commission's plans to widen Manchester Road and to

[fol. 384] straighten the creek; that in the spring he found that the stream overflowed and contained raw sewage which created an odor and a mess; that he received many complaints that summer from the mayor; that he consulted an architect in late 1956 to inspect the property and to see what could be done; that he was repeatedly in touch with the Highway Commission to ascertain their plans but was never able to find out what they were; that he did purchase the property and make the sales to Sunray and Tremarco; that he did not report the Sunray sale in his 1956 return because he had paid more for the property than the amount of that sale and thus had not recovered his cost; that he was told it would take a minimum of $40,000 to correct the creek; that in 1957 the creek conditions were even worse; that he received more complaints from the mayor; that he tried to fix the creek a little himself but was unsuccessful; that he often called the Commission but remained unable to get any definite information from them; that the mayor told him that he did not have the responsibility to fix the creek until the Commission produced its final plans; that the 1957 return was prepared near the last day for filing in April 1958; that by then the Tremarco sale had been closed; and that he did not report that sale because he had been told he would have to fix the creek, because he felt the forthcoming substantial expenditure on that project was part of his cost, and because he honestly believed he didn't have to report the sales until he had recovered his entire anticipated cost. He also testified that he had told Agent Conley of the coming expenditure on the land; that it was not true, as stated in the affidavit, that he was burdened financially and could not raise money to pay any tax due; and that he was then better off financially than he ever had been. He said that he told Conley the affidavit was not complete and that it contained inaccuracies.

[fol. 385] An architect testified that Sansone had asked him to inspect the property; that he did so in the fall of 1956; that he quoted Sansone the $40,000 minimum figure; and that he also told him it would be "stupid" to attempt this project until it was known exactly what the Highway

Commission was going to do. The mayor testified that the creek had been a constant source of complaint; that he talked with Sansone on numerous occasions and told him some corrective measures would have to be taken; that he himself had attempted to accelerate the development in that area; and that he told Sansone he did not expect him to make the permanent improvement until the Commission determined its plans.

A consulting engineer also testified for the defense. He, through a corporation, owned an interest in the property immediately across Manchester Road. He told of necessary corrective measures which were required, of their cost, of discussing this problem with Sansone, and of the lack of positive information from the Commission.

A. Willfulness. The defense argument is that the record is devoid of any legally significant evidence of willfulness; that Sansone's affidavit reciting "I knew I should have reported the 1957 sale" was the only evidence indicating improper intent; and that this admission is uncorroborated and is therefore unavailable to establish the charged crime's necessary element of willfulness.

The defense at this point presses upon us certain legal propositions:

1. An intent to evade or defeat the 1957 tax is an essential element of the crime under § 7201. *Holland* v. *United States,* 348 U.S. 121, 139 (1954); *Canton* v. *United States,* 226 F. 2d 313, 322 (8 Cir. 1955), cert. denied 350 U.S. 965.

2. Willfulness is not to be inferred "from the mere understatement of income", unaccompanied by such things [fol. 386] as a consistent pattern of underreporting large amounts of income or the failure of the taxpayer to include all his income in his books and records. *Holland* v. *United States,* supra, p. 139 of 348 U.S.; *Blackwell* v. *United States,* 244 F.2d 423, 429 (8 Cir. 1957), cert. denied 355 U.S. 838; *Black* v. *United States,* 309 F.2d 331, 337 (8 Cir. 1962), cert. denied 372 U.S. 934.

3. A defendant's after-the-fact and out-of-court admission of an essential element of an alleged crime requires

corroboration. The same is true of exculpatory or explanatory statements. And

> "Each case has its own facts admitted and its own corroborative evidence, which leads to patent individualization of the opinions. However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while establishing independently the other necessary elements of the offense. • • • It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

Opper v. *United States,* 348 U.S. 84, 89-93 (1954). These principles are applicable to the crime of tax evasion where "there is no tangible injury which can be isolated as a corpus delicti" and "where the corroborative evidence must implicate the accused in order to show that a crime has been committed" and, specifically, where the statement is given to an investigating governmental official. But

> [fol. 387] "It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. • • • All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused. • • •

> "Under the above standard the Government may provide the necessary corroboration by introducing substantial evidence, apart from petitioner's admissions, tending to show that petitioner willfully understated his taxable income."

Smith v. *United States,* 348 U.S. 147, 153-59 (1954). See, also, *United States* v. *Calderon,* 348 U.S. 160 (1954), and *Wong Sun* v. *United States,* 371 U.S. 471, 489, 503 (1963).

This court has recognized these principles and, as the defense suggests, the "requirement of corroboration by substantial independent evidence has not been taken lightly by this court". See, for example, *Banks* v. *United States,* 223 F.2d 884, 886-87 (8 Cir. 1955), cert. denied 350 U.S. 986; *Canton* v. *United States,* supra, p. 317 of 226 F.2d; *Zacher* v. *United States,* 227 F.2d 219, 223-24 (8 Cir. 1955), cert. denied 350 U.S. 993.

The government does not quarrel with these rules as such. The controversy, as is so often the case, lies in their application.

At this point we note that the defense appears to concede that if the Sansone affidavit is admissible it serves to establish every element of the government's case not supplied by other proof. This narrows the issue and we accept for present purposes the defense statement of it:

> [fol. 388] "[U]nder a full and fair review of the entire record in this case what independent evidence is there to corroborate and make trustworthy the appellant's admissions as to his intent with respect to his 1957 return and, if there is such independent evidence, is it truly substantial? * * * [H]ere he either stands or falls."

We deal here with a state of mind which is a subjective element. In *Blackwell* v. *United States,* supra, Judge Van Oosterhout, in speaking for this court, said, p. 429 of 244 F.2d: "Willfulness involves a state of mind. Direct proof of willfulness is seldom available". He made essentially the same observation in *Zacher* v. *United States,* supra, p. 224 of 227 F.2d. Many of the decided and cited

cases are concerned with objective evidence and its proof. *Opper, Smith, Calderon, Banks, Canton,* and *Zacher,* all supra, are examples of this. But there are also cases which concern the subjective. See *Smoot* v. *United States,* 312 F.2d 881 (D. C. Cir. 1962); *United States* v. *Sapperstein,* 312 F.2d 694 (4 Cir. 1963); *Scarbeck* v. *United States,* 317 F.2d 546, 565-69 (D. C. Cir. 1963), cert. denied 374 U.S. 856. These are significant and helpful here.

We conclude without great difficulty that, within the words quoted from the defense brief, there is independent evidence in this record "to corroborate and make trustworthy the appellant's admissions as to his intent with respect to his 1957 return" and that such independent evidence is "truly substantial". We find this corroboration and this substantiality in the following:

(1) The omission in the 1956 and 1957 returns of the gains realized on the real estate sales; (2) the inclusion in the 1956 return, with full description, of no less than 13 separate short term capital gains and losses on securities, thereby demonstrating the defendant's awareness of [fol. 389] the income character of a capital gain and of its measure; (3) the defendant's receipt through the two real estate sales of cash totaling more than $24,500 over and beyond his cost of the entire property, that is, after satisfaction of purchase obligations and attendant expenses; (4) the omission of any reference to the sales or their proceeds in the work papers supplied to Milosevich, despite the fact that the 1957 check from Land Title was for over $21,000 and represented the Sansone's largest cash receipt of the year; (5) the defendant's direct testimony that his financial condition in April and May 1958 was better than it ever had been in his life; (6) his possession of an education somewhat beyond the high school level; (7) his attainment of the rank of Major in the Air Force Reserve; (8) his experience, although not an extensive one, as a securities and real estate salesman; (9) his holding of a Missouri real estate salesman's license which, under Missouri law, presumes certain competency and requires an examination, V.A.M.S. § 339.040; (10) his obvious awareness of income tax details as demonstrated by

the appearance in both or one of the 1956 and 1957 returns of an exemption for his mother-in-law; of percentage deductions for (a) the expense, including depreciation, of his Cadillac automobile; (b) his telephone bill, and (c) heat and electric charges for his "home office"; of a deduction for "promotion and entertainment"; of deductions for uniforms and an automobile accident; and of the marking, in part for credit and in part for refund, of claimed overpayments due to withholding; (11) his deduction of the interest paid on the purchase money deed of trust to House Hunters, Inc. in 1956 but not in 1957 when that mortgage was paid off with the Tremarco sale resulting in the gain in question; and (12) his concession on the witness stand that he was "familiar with the reporting of capital gains".

[fol. 390] All this in the aggregate constitutes, in our view, independent evidence of sufficiently substantial character, which, in the language of *Opper,* tends "to establish the trustworthiness of the statement" in the Sansone affidavit. It "supports the essential facts admitted sufficiently to justify a jury inference of their truth". And it serves to fulfill the requirement of *Smith* that "All elements of the offense must be established by independent evidence or corroborated admissions".

We recognize that there is some force in the defense argument (1) that the Sansones made no attempt to conceal through strawmen their participation in the real estate purchase and sales; (2) that federal documentary stamps in appropriate amounts were apparently utilized and, at least in one instance, were affixed prior to recording; (3) that the deeds were promptly filed for record; (4) that the Sunray transaction did not gross at more than Sansone's cost; (5) that Fish Pot Creek presented a serious pollution and route problem; (6) that Sansone was deeply concerned about this and reasonably anticipated the burden of a substantial capital expenditure for its solution; (7) that he also reasonably anticipated that the expenditure might consume all his available cash; (8) that the 1956 and 1957 returns, except for the real estate capital gains, were otherwise accepted as filed; (9) that his omitted income was confined to these two years and

did not create a pattern over a longer period; (10) that it is known that a request for a refund often leads to audit and thus contraindicates willfulness; (11) that the reported 1956 securities gains and losses were simple in character and did not involve cost allocation; and (12) that Sansone's real estate experience was not extensive and was with a very small firm. These factors and such potency as they possess are, however, for the trier of fact. They are not for us where there is substantial op-
[fol. 391] posing evidence on which the jury's verdict may properly rest. That these factors did not convince the jury on the 1957 count is not a situation which we may undo on the record before us.

B. The lesser offense instructions. The defense claims prejudicial error in the trial court's refusal to charge the jury that it could find the defendant guilty of lesser crimes than the one charged by the indictment under § 7201. The statutes concerned are 26 U.S.C. §§ 7203 and 7207.

1. Section 7203. As we have noted, § 7201 is directed toward a willful attempt to evade or defeat any tax or its payment. Section 7203 concerns a willful failure to pay a tax or make a return or keep records or supply information; violation thereof is a misdemeanor and lesser punishment ensues.

This court already has been confronted with this issue under both the 1939 and the 1954 Codes. In each instance it has been decided against the defense. *Dillon* v. *United States*, 218 F.2d 97, 101 (8 Cir. 1955), cert. granted 349 U.S. 914 and dismissed 350 U.S. 906; *Janko* v. *United States*, 281 F.2d 156, 164 (8 Cir. 1960), reversed on other grounds, 366 U.S. 716; *Foley* v. *United States*, 290 F.2d 562, 567-69 (8 Cir. 1961), cert denied 368 U.S. 888.

Although the issue is not an easy one, and although in *Foley*, pp. 568-69 of 290 F.2d, we recognized that there may be situations where, under the evidence and § 7203, a defendant is entitled to lesser offense instructions, we conclude that this is not one of those situations. Here again the offense charged by the indictment was an affirmative act, namely, a willful attempt to evade tax by filing a false and fraudulent return in which taxable income was

knowingly understated; it did not rest on something less than positive, such as mere willful failure to file or to pay. The trial court's instructions as to this distinction were [fol. 392] carefully delineated. *Dillon, Janko,* and *Foley* are pertinently applicable to the facts of the present case and we adhere to our consistent rulings in those cases.

2. Section 7207. This is directed to the willful delivery or disclosure to a tax authority of any return known by the taxpayer to be fraudulent or false as to any material matter. It does not embrace in specific language, as did its antecedent, § 3616(a) of the 1939 Code, an intent to defeat or evade an assessment.

This issue, too, has been before this court and has been decided adversely to the defense. In *Janko* v. *United States,* supra, pp. 164-67 of 281 F.2d, we noted, among other things, that the lesser included offense question here was more complex than that presented by § 7203; that § 3616(a) had been held inapplicable to evasion of the income tax, *Achilli* v. *United States,* 353 U.S. 373 (1957); and that § 7207's positioning in the 1954 Code and a comment in the 1954 Committee Reports were of interest. Two of us concluded, for three stated reasons, that the defendant was not entitled to a lesser offense instruction under § 7207. Judge Matthes dissented on this one issue and relied in part upon prospective comments, seemingly sympathetic with his view, which has appeared in *Dillon* v. *United States,* supra, p. 103 of 218 F.2d, and in *Berra* v. *United States,* 351 U.S. 131, 134, footnote 5 (1956).

The issue remains difficult and close, as we recognized in *Janko,* and it has not been settled by the Supreme Court. Unfortunately, from the point of view of desiring a definitive answer, the Supreme Court's reversal of *Janko,* at the suggestion of the Solicitor General, on grounds of prejudicial publicity, a point on which this court was unanimous, left the question open. We only note [fol. 393] in passing that the Ninth Circuit seems to agree with the conclusion the *Janko* majority reached. *Redfield* v. *United States,* 315 F.2d 76, 82 (9 Cir. 1963), cert. denied 369 U.S. 803. So long as the *Janko* holding on this

issue remains unreversed on the books, we regard it as the law of this circuit.

Affirmed.

MATTHES, Circuit Judge, Concurring:

In concurring, I am constrained to add a few words in regard to the lesser offense instruction under 26 U.S.C. § 7207. In my dissenting opinion in *Janko* v. *United States*, 281 F.2d 156, 171, I attempted to demonstrate that § 7207 was applicable to income tax returns. However, the failure of the Supreme Court to resolve this question in *Janko* v. *United States*, 366 U.S. 716, although afforded the opportunity to do so, may lend support to the belief that my position is untenable. At any rate, a continued expression of my views would be in disregard of established realities.

[fol. 394] [File endorsement omitted]

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,399—September Term, 1963

MICHAEL C. SANSONE, Appellant,

vs.

UNITED STATES OF AMERICA.

JUDGMENT—July 17, 1964

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Michael C. Sansone, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

Order entered in accordance with Opinion:

Robert C. Tucker, Clerk, U. S. Court of Appeals for the Eighth Circuit.

[fol. 395] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 396]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—October 26, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether the willful delivery of a false income tax return, a misdemeanor under section 7207 of the Internal Revenue Code of 1954, is a lesser included offense within section 7101 thereof, making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31 (c) of this Federal Rule of Criminal Procedure to a lesser offense instruction with respect thereto.

"2. Whether the willful failure to pay one's income tax, a misdemeanor under section 7203 of the Internal Revenue Code of 1954, is a lesser included offense within section 7201 thereof making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant

is entitled under Rule 31 (c) of the Federal Rules of Criminal Procedure to a lesser offense instruction with respect thereto."

[fol. 397]

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 365

MICHAEL C. SANSONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

MICHAEL C. SANSONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner Michael C. Sansone prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on July 17, 1964.

OPINION BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed in the Appendix hereto (p. 19).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 17, 1964 (Appendix, p. 34). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED.

1. Whether the willful delivery of a false income tax return, a misdemeanor under section 7207 of the Internal Revenue Code of 1954, is a lesser included offense within section 7201 thereof, making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31 (c) of this Federal Rule of Criminal Procedure to a lesser offense instruction with respect thereto.

2. Whether the willful failure to pay one's income tax, a misdemeanor under section 7203 of the Internal Revenue Code of 1954, is a lesser included offense within section 7201 thereof making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31 (c) of the Federal Rules of Criminal Procedure to a lesser offense instruction with respect thereto.

3. Whether, in a prosecution for income tax evasion in which the element of willfullness and intent is established by a confession, independent corroboration of a defendant's admission of understatement of income can be considered as corroboration for that portion confessing his specific intent.

4. Whether a court, seeking to apply the rule requiring corroboration of a confession, may rely solely on certain facts which are ostensibly corroborative, yet disregard (and make a jury question of) other uncontroverted, admitted facts which render unsubstantial the corroborative effect of the facts relied upon.

STATUTES INVOLVED.

Sections 7201, 7203, and 7207 of the Internal Revenue Code of 1954 (26 U. S. C. §§ 7201, 7203, 7207) and Rule 31 (c) of the Federal Rules of Criminal Procedure are printed in the Appendix to this petition (p. 36).

STATEMENT.

Petitioner adopts in its entirety the statement of facts set forth in the opinion below (Appendix, p. 19) with the following brief additions.

At the close of the government's case (R. 156) and at the close of the entire case (R. 253), defendant-petitioner moved for judgment of acquittal on the grounds that the evidence failed to prove the specific intent element required in a section 7201 violation, and particularly because his admission as to intent had not been corroborated by substantial independent evidence.

Petitioner requested the trial court to include in its charge two instructions on lesser offenses, as follows:

> **"Defendant's Requested Instruction No. 1.**
>
> Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.
>
> A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:
>
> > 'Any person required under this title to pay any * * * tax, * * * who willfully fails to pay such tax, * * * at the time or times required by law or regulations, shall, in addition to other . .

penalties provided by law, be guilty of a misdemeanor.'

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'

If you have a reasonable doubt as to whether defendant willfully failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

"Defendant's Requested Instruction No. 2.

As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:

'Any person who willfully delivers or discloses to the Secretary [of the Treasury] or his delegate any * * * return, * * *, * * * or other document known by him to be fraudulent or to be false as to any material matter.'

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'

If you have a reasonable doubt as to whether defendant willfully so delivered under any count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

Both of these instructions were refused, to which petitioner specifically excepted (R. 316). Instructions No. 2 and No. 1 are discussed in the first and second reasons respectively hereinafter given for this Court's grant of certiorari.

Petitioner's judgment of conviction and sentence of fifteen months imprisonment plus a fine of $2,000.00 was affirmed by the United States Court of Appeals for the Eighth Circuit on July 17, 1964 (Appendix, p. 34).

REASONS FOR GRANTING THE WRIT.

1. Certiorari should be granted on the first issue presented as a "question of general importance in the enforcement of the income tax." Such was the reason given

by this Court when it decided to resolve this matter under the Internal Revenue Code of 1939, **Achilli v. United States**, 353 U. S. 373, 374. The same considerations which prompted this Court to grant certiorari three times in order to resolve this important question under the 1939 Code (**Dillon v. United States**, 349 U. S. 914; **Berra v. United States**, 350 U. S. 910; **Achilli v. United States**, 352 U. S. 1023) now call for a grant of certiorari to resolve it under the Internal Revenue Code of 1954. Both opinions in the instant case are an open invitation by the Eighth Circuit to resolve this "difficult and close" issue; the majority opinion calls it unfortunate that this Court's reversal of **Janko v. United States**, 366 U. S. 716, at the suggestion of the Solicitor General, on the grounds of prejudicial publicity, "left the question open," see Appendix, p. 33. The concurring opinion here by the same judge who dissented in **Janko** when it was before the Eighth Circuit, also, notes the failure of this Court to resolve the question in **Janko**, supra, as perhaps supportive of the belief that his prior position is untenable, but declines to comment further because "a continued expression of my views would be in disregard of established realities," see Appendix, p. 34. "From the point of view of desiring a definitive answer," Appendix, p. 33, both opinions here share the disappointment that **Janko**, supra, did not settle the issue, and implicit in both is the hope that the instant case will be the vehicle for doing so in a matter so vital to income tax prosecutions.

It will not do to say that (it having been decided in **Achilli**, supra, that section 7207's statutory predecessor is not applicable to income tax returns), the same result follows for section 7207 of the 1954 Code. At the very time Congress enacted section 7207, it must have been aware of the Government's then use of section 3616 (a) of the 1939 Code in income tax prosecutions and intended

that section 7207 should continue to apply to income tax returns. In addition, references to section 7207 in other sections of the 1954 Code indicate that Congress intended that section 7207 apply to income tax returns. Section 7207 is specifically mentioned in section 6013 (b) (5) (B) entitled "Joint Returns of Income Tax by Husband and Wife" for the purpose of clarifying the income tax criminal liabilities of spouses. The clear wording of section 6013 (b) (5) (B) presupposes criminal liability for fraudulent income tax returns under section 7207.[1] Also, the location of section 7207 in the 1954 Code in contrast to the positioning of section 3616 (a) in the 1939 Code bolsters the conclusion that section 7207 applies to income tax returns. Section 3616 (a) appeared under the heading "General Administrative Provisions" in the 1939 Code among several statutes covering a multitude of subjects other than income taxes. Section 7207 appears in the 1954 Code in Part I of Subchapter A of Chapter 75, entitled "Crimes, Other Offenses, and Forfeitures." It thus appears from the legislative scheme of the 1954 Code that all of the penalty measures in Part I of Subchapter A of Chapter 75, incorporating section 7201 and other income tax crimes, including section 7207, were intended to apply to any and all taxing provisions unless otherwise specifically indicated.

Of prime importance to a consideration of whether or not the result reached under section 3616 (a) of the 1939 Code is applicable to section 7207 of the 1954 Code are the significant changes in wording of new section 7207 and

---

[1] That this is even the Commissioner's view is seen in his Regulation 1:6013-2 (e) (2), reading as follows:

> "(2) For the purposes of section 7206 (1) and (2) and section 7207 (relating to criminal penalties in the case of fraudulent returns) the term 'return' includes a separate return filed by a spouse with respect to a taxable year for which a joint return is made under section 6013 (b) after the filing of a separate return."

their effect on the problem of overlapping considered by this Court in **Berra v. United States**, 351 U. S. 131. Section 3616 (a) read: "Whenever any person . . . delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made . . . he shall be fined not exceeding $1,000.00 or be imprisoned not exceeding one year, or both. . . ." Section 7207 deleted from section 3616 (a) the words "with intent to defeat or evade the valuation, enumeration, or assessment intended to be made." It added the words "known by him to be fraudulent or to be false as to any matter" and the word "willfully" so that it reads: "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000.00, or imprisoned not more than one year, or both." The significance of these changes is that they eliminate any need to prove under section 7207 the existence of a tax deficiency or a specific tax evasion intent. Thus, factual issues to be submitted to the jury under sections 7201 and 7207 of the 1954 Code are no longer identical as they were under sections 145 (b) and 3616 (a) of the 1939 Code. They no longer "cover precisely the same ground," see **Berra**, supra, 351 U. S. 134; as said in the Eighth Circuit's earlier **Dillon** case, 218 F. 2d 97, 103:

> "Section 7207 appears in the statutory context with other offenses relating to income tax offenses. It is sufficiently broad to apply to both income tax derelictions as well as to those subjects other than income taxes with which section 3616 was in juxtaposition. The only substantial portion of section 3616 which was retained and carried forward in the 1954 revision was placed with income tax derelictions. And then the

element of willfullness, absent in section 3616 but previously consistently present in offenses relating to income tax violations, was inserted."

See, also, **Berra**, supra, footnote 5, 351 U. S. 134. The overlapping in all respects of section 7207 with section 7201 can no longer be advanced as a reason for section 7207's inapplicability to income tax prosecutions and for denial of the lesser offense instruction under Rule 31 (c) of the Federal Rules of Criminal Procedure. The misdemeanor of section 7207 no longer covers precisely the same ground as the felony-evasion offense of section 7201, and it is necessarily violated in any prosecution in which the means of attempted evasion is the filing of a false return. Depending on how the jury views the other evidence in a case, it may find the filing of a false return either a willful delivery of a return known to be fraudulent under the misdemeanor provisions of section 7207 or an attempted evasion of income tax with the requisite specific intent under the felony provisions of section 7201. Unlike **Berra**, the requested instruction here would have raised a separate factual issue under section 7207, and the question is not simply one of proper sentencing. Neither the legislative history, nor the wording of the statute, nor the policy reasons which impelled this Court to conclude in **Achilli** that under the 1939 Code 3616 (a) was not applicable to income tax returns are present with respect to section 7207 of the 1954 Code, but the reasons for the resolution of this question under the 1954 Code are as compelling today as they were when this Court resolved it in **Achilli** under the 1939 Code.

2. The instant record illustrates perfectly how proof of an attempted income tax evasion under section 7201 may also include proof of a lesser included offense under section 7203. No question is present concerning section 7203's application to the income tax. The proffered instruction

here was based upon petitioner's willful failure to pay his 1957 income tax under section 7203. The prosecution's own evidence (as set out in the statement taken from petitioner, see Appendix, pp. 22-23) makes a case for a willful failure to pay a tax when due, if the jury should choose to believe petitioner's claim that his filing of his 1957 income tax return was not an attempt to evade his income tax:

> "I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so."

On the other hand, the jury could have chosen to disbelieve petitioner and to regard the knowledge of his obligation to pay, his failure to pay, and his then financial condition as indicative of an attempt to defeat and evade his income taxes under the felony provisions of section 7201. The important feature for our purposes is that the evidence supported either finding of fact by the jury (the former offense under section 7203 being included in the latter offense under section 7201), but the jury was never given the opportunity to discharge fully its function as the finders of fact. It's choice was either conviction of an attempted evasion or outright acquittal—contrary to Rule 31 (c) of the Federal Rules of Court Procedure providing that a "defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense

necessarily included therein if the attempt is an offense." In **Spies v. United States**, 317 U. S. 492, this Court in speaking of the crime of income tax evasion wrote, 317 U. S. 497: "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws". The instant record presents a classic example of what this Court was talking about in **Spies**; since willfulness and an additional tax owing are two of the elements of the evasion offense, it seems clear that the misdemeanor offense of willful failure to pay a correct tax must be violated in order to commit a crime under section 7201. The additional element to be found by the jury in distinguishing between the two offenses is whether or not there was sufficient affirmative action for the felony or only a non-compliance with or neglect of statutory duties for the misdemeanor.[1] It is the Eighth Circuit's failure to recognize the necessary overlapping of certain elements of the two crimes (the felony containing the additional element of affirmative action) which has caused it to reject lesser offense instructions under section 7203. see Appendix p. 31. Other courts under analogous provisions of section 7203 (involving a willful failure to supply information) have recognized the application of these principles in finding such willful failure a lesser offense in an evasion prosecution, see **Chaifetz v. United States**, 181 F. Supp. 57, affirmed, 288 F. 2d 133 (Dist. Col.), reversed on one count, 366 U. S. 209; **Kobey v. United States**, 208

[1] This requisite affirmative action was defined "by way of illustration, and not by way of limitation" as "affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct the likely effect of which would be to mislead or to conceal." *Spies v. United States*, supra, at p. 499.

F. 2d 583 (9th Cir.); **United States v. McCue**, 160 F. Supp. 595 (D. Conn.). As noted in the instant opinion, "the issue is not an easy one", Appendix p. 32; however, it is nonetheless important that it be settled. This Court's grant of certiorari in **Dillon v. United States**, 349 U. S. 914, would have resolved the question in 1955 (see question No. 2, Petition for Certiorari, No. 629, October Term, 1954), but petitioner Dillon's death caused the writ to be dismissed on the Solicitor General's suggestion of mootness, 350 U. S. 906. Now almost ten years later the matter is still alive and not being given uniform treatment by our district and appellate courts; it deserves to be laid to rest.

3. The Eighth Circuit's treatment of the issue concerning corroboration of petitioner's "confession" injects confusion into the rules laid down by this Court in **Smith v. United States**, 348 U. S. 147, and **Opper v. United States**, 348 U. S. 84, and is at variance with the method of application of these rules adopted in other circuits in recent years. The opinion below fairly and thoroughly sets forth the pertinent facts and evidence in regard to this issue; moreover, it fully recognizes the general principles of law involved:

(1) That willfulness, or specific intent, is a separate and distinct element of the crime of tax evasion, which the government must sustain the burden of proving in order to justify a conviction;

(2) That willfulness cannot be inferred from mere understatement of income;

(3) That when the government seeks to prove an element of an offense by a confession or admission, it must introduce substantial independent evidence to corroborate that confession or admission and demonstrate the trustworthiness thereof.

Yet, when applying these rules to the undisputed facts of this case, the court below employs reasoning which is in complete conflict with the interpretation given them in the other circuits. Briefly stated, the Eighth Circuit's approach is simply that independent evidence which corroborates **any** part of the confession, not necessarily that part dealing with the element sought to be proved, is adequate to satisfy the **Smith-Opper** rule.

Three separate and distinct elements comprise the crime of tax evasion: the omission of income from the return, the specific intent or willfulness, and the taxpayer's affirmative action to evade. Here the first element was clearly conceded throughout the trial; petitioner and his counsel freely admitted, at every stage of the proceeding, that the capital gain income was received and should have been included in the 1956 and 1957 returns (R. 9-12, R. 189-190, 196). The second element, specific intent, was established only by the written admission. This document (Exhibit N, R. 104) was largely devoted to facts concerning the omitted income itself, i. e., the first element of the offense. One portion of the statement, however, contains the admission by petitioner that "I knew that I should have reported the 1957 sale," and hence confesses to the second element of the crime. The absence of corroboration as to this second element was thus a principal contention urged on appeal. The Eighth Circuit, however, cited some twelve items of evidence as providing the necessary corroboration (Appendix pp. 29-30):

(1) the actual omission of the income in question from the returns;

(2) the inclusion of other capital gains items in the 1956 return;

(3) defendant's receipt of cash over and above his cost of the land;

(4) omission of the income in question from papers supplied to defendant's accountant;

(5) defendant's financial condition was good;

(6) defendant's education beyond high school level;

(7) defendant's rank as a Major in the Air Force;

(8) defendant's experience as a real estate salesman;

(9) defendant's holding a license as a real estate salesman;

(10) the inclusion of other income tax details in his returns;

(11) his deduction of interest paid on loans in connection with the transaction;

(12) his admitted awareness of the capital gains concept.

But much of this evidence corroborates the admission only insofar as it deals with the first element—the omission of income from the return. Thus, petitioner's actual omission of the income from his return, his receipt of cash over and above his cost, and omission of the income from work papers supplied to his accountant are the most substantial items of independent evidence involved, yet each corroborates only that portion of the admission dealing with the omission of income and has no bearing on the intent aspect. Among other factors cited are those which deal with items actually contained in the return, but these cannot be considered substantial because these returns were undeniably prepared in all their technical aspects by defendant's brother-in-law, an experienced accountant (R. 40-44). The skill and ability of the accountant evidencing familiarity with income tax problems is not attributable to petitioner as evidence of the latter's knowledge. The only "corroborative" evidence which might even vaguely bear on the issue of intent is peti-

tioner's education, his experience as a real estate salesman (including his holding of a salesman's license), and his general awareness of the capital gains concept. But apparently even the court below would not rely on these few smatterings as **substantial** corroboration; it simply grouped them with all of the other independent evidence, evidence which corroborated the admission only as to the **first** element of the offense, and held that the entire collection of facts and circumstances was sufficient to corroborate as to the **second** element. In short, the court treated the written admission as a singular subject, hence evidence corroborating any portion of it would tend to corroborate the entire statement.

Whether the Eighth Circuit's approach be right or wrong, it is certainly inconsistent with the interpretation given to the **Smith-Opper** rule in other Courts of Appeals. The rule has been held to require that where a confession includes various elements of an offense, each portion thereof dealing with a specific element must be substantially corroborated by independent evidence.

Scarbeck v. United States, 317 F. 2d 546 (D. C.), precisely illustrates this. Although eventually holding that the record contained the necessary corroborative evidence, the District of Columbia Court of Appeals first held that substantial independent evidence must be found to corroborate each separate element which is confessed. The same reasoning was applied in **United States v. Sapperstein**, 312 F. 2d 694, where the Fourth Circuit, in a Mann Act prosecution, noted that the confessed element of intent must be independently corroborated, even though the record was replete with evidence of the other element, i. e., interstate transportation of the female. A similar requirement was made in **Smoot v. United States**, 312 F. 2d 881 (D. C.).

Petitioner recognizes that, in evaluating whether a specific admission or confession has been sufficiently cor-

roborated, prior cases and precedents are of little value; each case must stand or fall on its own facts, and whether a Court of Appeals in a given case has reached a correct result under **Smith** and **Opper** may not be a matter of such moment as to require Supreme Court review. But, here because of the novel and conflicting approach used by the Eighth Circuit, this case now becomes one which can have wide effect in the administration of criminal justice, particularly if it receives tacit approval by a denial of certiorari. Does the requirement laid down by the Supreme Court in **Smith** and **Opper** mean that each element which the government seeks to prove by confession must be **separately** corroborated by substantial independent evidence, as the lower courts have heretofore held? Or does the **Smith-Opper** rule merely require that a confession, taken as a whole and as one entire statement, be supported by any substantial evidence which corroborates portions of it and thereby renders the entire statement legally sufficient to prove all it contains? Significantly, the problem was not specifically considered in either the **Smith** or **Opper** decision, and it was only a matter of time (particularly in view of the plethora of multi-element federal crimes on the books) before the conflict in interpretations arose. The full development of the law on this issue requires a resolution of this question, so that the **Smith-Opper** opinions can become the proper guideposts in all situations.

The issue is brought into sharper focus in the instant case when one considers the accumulation of uncontroverted evidence which refutes any inference of willfulness or specific intent on the part of the petitioner. The Eighth Circuit recognized the import of such facts as (Appendix, pp. 30-31):

(1) Petitioner dealt in his own name, employing no straw party;

(2) He affixed appropriate documentary stamps to each deed;

(3) All deeds were promptly recorded;

(4) There was no consistent pattern of under-reporting;

(5) The capital gains which were reported on the 1957 returns, and with which petitioner had some familiarity, were simple transactions and did not involve cost allocation theories;

(6) Petitioner reasonably anticipated compulsory expenditures on the property in excess of the cash realized in 1957;

(7) Petitioner's experience in real estate was very limited in a small firm.

However, the court dismisses these as merely raising issues for the jury in deciding guilt or innocence. But the court overlooks the fact that the issue of corroboration is one solely for the court, and some of these uncontroverted facts clearly minimize or eliminate the corroborative effect of the other evidence relied upon. In other words, when searching the record for the required corroboration, a court should not lift isolated facts out of context and ignore uncontroverted evidence which might totally destroy the corroborative effect of such facts or render them unsubstantial. It is one thing to say that petitioner was an experienced real estate salesman and knew about capital gains—this alone would seem to fortify admissions as to his willfulness. But it is quite a different matter when one considers that his real estate experience was very limited, and that the capital gains he knew about were simple stock transactions with no problems of cost allocation. Since these were all uncontroverted facts, conceded by both sides, with no issue as to veracity, they should have been considered in their entirety by the court in evaluating their

corroborative effect. This was not a matter to be left to the jury—it is solely the court's responsibility in the first instance to determine, as a matter of law, whether or not an admission has been substantially corroborated.

Petitioner submits that the total record here is devoid of substantial corroboration on the element of intent. But this is not the critical issue; of much greater importance is the method and approach used by the Eighth Circuit in attempting to apply the **Smith** and **Opper** rules. That the court below sought corroboration only for the entire written admission without requiring separate corroboration for each separate confessed element of the crime, and that it found substantial corroboration by resort to the plusses in favor of (while making a jury question of the uncontroverted minuses against) corroboration, are matters which should be of sufficient concern to the entire field of criminal jurisprudence to warrant a grant of certiorari.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX.

United States Court of Appeals
For the Eighth Circuit.

No. 17,399.

Michael C. Sansone,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 17, 1964.]

Before Vogel, Matthes and Blackmun, Circuit Judges.

Blackmun, Circuit Judge.

Michael C. Sansone, age 41, after a plea of not guilty, was convicted by a jury of a willful and knowing attempt, in violation of 26 U.S.C. §7201, to evade and defeat his federal income tax for the calendar year 1957. He had been charged in a 2-count indictment with a violation of this statute for both 1956 and 1957, but was acquitted as to 1956. Judge Harper imposed a $2,000 fine and a 15-month sentence. The defendant appealed.

The case comes down to the omission from Sansone's 1957 return of about $20,000 in long term capital gain realized upon the disposition of real estate. That the gain was realized, that it was not reported, and that it should have been reported are conceded by the defense.

The issues are (A) whether the admissible evidence established the essential element of willfulness on the part of Sansone and (B) whether he was entitled to lesser-included-offense instructions. On the first issue the

admissibility of an after-the-act affidavit executed by Sansone and given to an investigating intelligence agent assumes vital importance.

The objective facts are not in dispute. Sansone and his wife in 1956 and 1957 lived in a Saint Louis suburb. They filed joint returns for both years. Their 1957 return as filed showed adjusted gross income of $7,585 and taxable income of $2,963. The income reported consisted of Mrs. Sansone's salary as a teacher, sums received by Mr. Sansone from the Department of the Air Force, and his net income as a securities salesman. It was stipulated that the taxpayers earned and received these items in 1957. The return disclosed no capital gain or loss and no other income.

On December 6, 1955, Sansone obtained from House Hunters, Inc., an option to purchase certain land in Saint Louis County. In the following February he exercised this option and a contract for sale was signed. It ran from the vendor to the Sansones. It specified a price of $22,500, payable $17,500 in cash and $5,000 by a purchase money deed of trust on part of the real estate.

Sansone at the same time effected a sale of a portion of the land to D-X Sunray Oil Company for $20,000. Land Title Insurance Co. of St. Louis handled both Sansone's purchase and his sale to Sunray. It closed the two transactions simultaneously and issued the Sansones its check for $2,891.71. This was the amount remaining after appropriate charges and after debiting the Sansones for their $22,500 purchase price and crediting them for the $20,000 Sunray proceeds plus the deed of trust obligation. Both deeds were filed for record on March 21, 1956. This Sunray transaction resulted in 1956 gain which was not reported and which was the subject of the first and acquitted count of the indictment.

In August 1957 Sansone sold another portion of his tract. This was to Tremarco Corporation and was for a gross price of $27,000. This time Land Title issued the Sansones its check for $21,671.67, representing the net payable to them after vendor's expenses and after payment of the amount due on the deed of trust. The deed to Tremarco was immediately recorded. This Tremarco transaction resulted in 1957 gain which was not reported and which was the subject of the second and convicted count of the indictment.

In summary and to repeat: The defendant purchased a tract of land in March 1956 for $22,500. He promptly sold a portion of the same land for $20,000. In 1957 he sold another portion for $27,000. The gains realized on these respective sales were not reported in the Sansone returns for 1956 and 1957.

On the question of willfulness the government's case rested primarily upon the testimony of Steve Milosevich, of Revenue Agent John J. Conley, and of the defendant himself, and upon Sansone's own written statement hereinafter mentioned. Because of the difficulty and sensitivity of the issue, we review this evidence in some detail.

Milosevich was Mrs. Sansone's brother. He operated a delicatessen-sandwich shop. He had had some experience as a junior accountant. He prepared the Sansones' 1956 and 1957 returns. He testified that at the time he prepared the 1956 return he was "not sure" he had information that the Sansones "had a real estate transaction" but "I think at that time I may have been aware that there was" one. He also said that he prepared the 1957 return from work sheets presented to him by the taxpayers; that there was no information on those sheets pertaining to any real estate transaction other than real estate taxes paid; that again he was "not sure" whether he knew at the time he prepared the return that the

Sansones had sold a piece of property; and that he learned about the real estate transaction through conversations with the Sansones but that he did not "recall exactly when it was".

Conley was a special agent with the Intelligence Division. He and Agent Purk conferred with the Sansones in May 1960. They then lived in Phoenix, Arizona. The agents saw the defendant at his home on three successive days beginning May 3. On May 5 Conley took from the defendant a written statement subscribed and sworn to by Sansone before Conley and denominated an affidavit. This was prepared by Conley. It was admitted into evidence at the trial over objection. The statement twice recites that it was made voluntarily and goes on to state that the affiant understood it, that it was made without threat or promise of immunity, and that he had been advised as to his constitutional rights. It further recites that the Sansones' returns for 1956 and 1957 (and for 1958) were prepared by Milosevich from work papers compiled by Mrs. Sansone, and

> "I did not report the 1956 sale in our 1956 joint income tax return because I thought that I was entitled to recover my entire cost before reporting any sales in my income tax returns. I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.
>
> "My brother-in-law, Steve Milosevich, knew that we had this real estate and had made several sales,

but he did not advise us whether or not to report the 1956 and 1957 sales and the matter was not discussed with him as he merely prepared the returns from the workpaper we gave him in these years."

Conley testified that he adjusted the 1956 return to reflect the Sunray sale; that this was a short term capital gain; that he determined basis on the part sold by allocating to it a portion of the cost of the entire tract; that this allocation was based on assessed valuations approved by the Sansones on Land Title's closing statement; that he adjusted the 1957 return to include the long term capital gain on the sale to Tremarco; and that he used the assessed valuation method for determining basis of the Tremarco tract.

On cross-examination Conley testified that there are a number of approved methods for apportioning cost; that when Agent Purk made allocations for the later actual payment of the tax he used a method based on front footage; that the Sansones produced for the agents all the documents they requested, and made a place available for them in which to work; that, apart from the omission of the sales in the returns, he found no evidence that the defendant attempted to conceal any part of these transactions; that the checks the Sansones received were deposited without concealment; that the affidavit did not cover all the discussions had with the Sansones; that they discussed Fish Pot Creek which ran through the real estate; that, although the defendant was not present when the affidavit was typed, he had approved a rough draft and was given the opportunity to add anything he wished; that he examined the Sansones' bank statements; that their May 1958 statement showed a balance of $9,286.74; and that Sansone had said he wanted to pay his tax.

The defense for the 1957 case is largely concerned with Fish Pot Creek. This stream ran through the Sansone

property west of the portions sold to Sunray and Tremarco. The claim is that Sansone was confronted with large capital expenditures required to correct conditions which the creek had created; that these expenditures would be far greater than any gain realized in the 1957 sale; that any meaningful development was necessarily delayed until the Missouri Highway Commission concluded its plans for improvements to Manchester Road which bordered the property at the south and under which the creek flowed; that Sansone honestly believed that he could wait until these expenditures were ascertained and then determine whether he had any gain on the entire tract; that, although he now knows this was erroneous, it nevertheless was an honest belief which he held when his returns were filed; and that he did not intend to avoid payment of any taxes.

In support of this defense Sansone himself took the stand. He testified that his own average income in 1954 through 1956 was around $3,000 to $3,200 annually; that he desired to supplement this by acquiring a piece of property to develop; that he first saw the land in question in the winter of 1955-56 when the creek did not appear unusual; that during that winter he learned of the Commission's plans to widen Manchester Road and to straighten the creek; that in the spring he found that the stream overflowed and contained raw sewage which created an odor and a mess; that he received many complaints that summer from the mayor; that he consulted an architect in late 1956 to inspect the property and to see what could be done; that he was repeatedly in touch with the Highway Commission to ascertain their plans but was never able to find out what they were; that he did purchase the property and make the sales to Sunray and Tremarco; that he did not report the Sunray sale in his 1956 return because he had paid more for the property than the amount of that sale and thus had not re-

covered his cost; that he was told it would take a minimum of $40,000 to correct the creek; that in 1957 the creek conditions were even worse; that he received more complaints from the mayor; that he tried to fix the creek a little himself but was unsuccessful; that he often called the Commission but remained unable to get any definite information from them; that the mayor told him that he did not have the responsibility to fix the creek until the Commission produced its final plans; that the 1957 return was prepared near the last day for filing in April, 1958; that by then the Tremarco sale had been closed; and that he did not report that sale because he had been told he would have to fix the creek, because he felt the forthcoming substantial expenditure on that project was part of his cost, and because he honestly believed he didn't have to report the sales until he had recovered his entire anticipated cost. He also testified that he had told Agent Conley of the coming expenditure on the land; that it was not true, as stated in the affidavit, that he was burdened financially and could not raise money to pay any tax due; and that he was then better off financially than he ever had been. He said that he told Conley the affidavit was not complete and that it contained inaccuracies.

An architect testified that Sansone had asked him to inspect the property; that he did so in the fall of 1956; that he quoted Sansone the $40,000 minimum figure; and that he also told him it would be "stupid" to attempt this project until it was known exactly what the Highway Commission was going to do. The mayor testified that the creek had been a constant source of complaint; that he talked with Sansone on numerous occasions and told him some corrective measures would have to be taken; that he himself had attempted to accelerate the development in that area; and that he told Sansone he did not expect him to make the permanent improvement until the Commission determined its plans.

A consulting engineer also testified for the defense. He, through a corporation, owned an interest in the property immediately across Manchester Road. He told of necessary corrective measures which were required, of their cost, of discussing this problem with Sansone, and of the lack of positive information from the Commission.

A. Willfulness. The defense argument is that the record is devoid of any legally significant evidence of willfulness; that Sansone's affidavit reciting "I knew I should have reported the 1957 sale" was the only evidence indicating improper intent; and that this admission is uncorroborated and is therefore unavailable to establish the charged crime's necessary element of willfulness.

The defense at this point presses upon us certain legal propositions:

1. An intent to evade or defeat the 1957 tax is an essential element of the crime under § 7201. **Holland v. United States**, 348 U. S. 121, 139 (1954); **Canton v. United States**, 226 F. 2d 313, 322 (8 Cir. 1955), cert. denied 350 U. S. 965.

2. Willfulness is not to be inferred "from the mere understatement of income", unaccompanied by such things as a consistent pattern of underreporting large amounts of income or the failure of the taxpayer to include all his income in his books and records. **Holland v. United States**, supra, p. 139 of 348 U. S.; **Blackwell v. United States**, 244 F. 2d 423, 429 (8 Cir. 1957), cert. denied 355 U. S. 838; **Black v. United States**, 309 F. 2d 331, 337 (8 Cir. 1962); cert. denied 372 U. S. 934.

3. A defendant's after-the-fact and out-of-court admission of an essential element of an alleged crime requires corroboration. The same is true of exculpatory or explanatory statements. And

> "Each case has its own facts admitted and its own corroborative evidence, which leads to patent indi-

vidualization of the opinions. However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti.* It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while establishing independently the other necessary elements of the offense. * * * It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

Opper v. United States, 348 U. S. 84, 89-93 (1954). These principles are applicable to the crime of tax evasion where "there is no tangible injury which can be isolated as a corpus delicti" and "where the corroborative evidence must implicate the accused in order to show that a crime has been committed" and, specifically, where the statement is given to an investigating government official. But

> "It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a prepondérance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. * * * All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused. * * *

> "Under the above standard the Government may provide the necessary corroboration by introducing substantial evidence, apart from petitioner's admissions, tending to show that petitioner willfully understated his taxable income."

Smith v. United States, 348 U. S. 147, 153-59 (1954). See, also, **United States v. Calderon**, 348 U. S. 160 (1954), and **Wong Sun v. United States**, 371 U. S. 471, 489, 503 (1963).

This court has recognized these principles and, as the defense suggests, the "requirement of corroboration by substantial independent evidence has not been taken lightly by this court". See, for example, **Banks v. United States**, 223 F. 2d 884, 886-87 (8 Cir. 1955), cert. denied 350 U. S. 986; **Canton v. United States**, supra, p. 317 of 226 F. 2d; **Zacher v. United States**, 227 F. 2d 219, 223-24 (8 Cir. 1955), cert. denied 350 U. S. 993.

The government does not quarrel with these rules as such. The controversy, as is so often the case, lies in their application.

At this point we note that the defense appears to concede that if the Sansone affidavit is admissible it serves to establish every element of the government's case not supplied by other proof. This narrows the issue and we accept for present purposes the defense statement of it:

> "[U]nder a full and fair review of the entire record in this case what independent evidence is there to corroborate and make trustworthy the appellant's admissions as to his intent with respect to his 1957 return and, if there is such independent evidence, is it truly substantial? * * * [H]ere he either stands or falls."

We deal here with a state of mind which is a subjective element. In **Blackwell v. United States**, supra, Judge Van Oosterhout, in speaking for this court, said, p. 429 of

244 F. 2d: "Willfulness involves a state of mind. Direct proof of willfulness is seldom available". He made essentially the same observation in **Zacher v. United States**, supra, p. 224 of 227 F. 2d. Many of the decided and cited cases are concerned with objective evidence and its proof. **Opper, Smith, Calderon, Banks, Canton**, and **Zacher**, all supra, are examples of this. But there are also cases which concern the subjective. See **Sinoot v. United States**, 312 F. 2d 881 (D. C. Cir. 1962); **United States v. Sapperstein**, 312 F. 2d 694 (4 Cir. 1963); **Scarbeck v. United States**, 317 F. 2d 546, 565-69 (D. C. Cir. 1963), cert. denied 374 U. S. 856. These are significant and helpful here.

We conclude without great difficulty that, within the words quoted from the defense brief, there is independent evidence in this record "to corroborate and make trustworthy the appellant's admissions as to his intent with respect to his 1957 return" and that such independent evidence is "truly substantial". We find this corroboration and this substantiality in the following:

(1) The omission in the 1956 and 1957 returns of the gains realized on the real estate sales; (2) the inclusion in the 1956 return, with full description, of no less than 13 separate short term capital gains and losses on securities, thereby demonstrating the defendant's awareness of the income character of a capital gain and of its measure; (3) the defendant's receipt through the two real estate sales of cash totaling more than $24,500 over and beyond his cost of the entire property, that is, after satisfaction of purchase obligations and attendant expenses; (4) the omission of any reference to the sales or their proceeds in the work papers supplied to Milosevich, despite the fact that the 1957 check from Land Title was for over $21,000 and represented the Sansone's largest cash receipt of the year; (5) the defendant's direct testimony that his financial condition in April and May 1958 was

better than it ever had been in his life; (6) his possession of an education somewhat beyond the high school level; (7) his attainment of the rank of Major in the Air Force Reserve; (8) his experience, although not an extensive one, as a securities and real estate salesman; (9) his holding of a Missouri real estate salesman's license which, under Missouri law, presumes certain competency and requires an examination, V. A. M. S., § 339.040; (10) his obvious awareness of income tax details as demonstrated by the appearance in both or one of the 1956 and 1957 returns of an exemption for his mother-in-law; of percentage deductions for (a) the expense, including depreciation, of his Cadillac automobile; (b) his telephone bill, and (c) heat and electric charges for his "home office"; of a deduction for "promotion and entertainment"; of deductions for uniforms and an automobile accident; and of the marking, in part for credit and in part for refund, of claimed overpayments due to withholding; (11) his deduction of the interest paid on the purchase money deed of trust to House Hunters, Inc., in 1956 but not in 1957 when that mortgage was paid off with the Tremarco sale resulting in the gain in question; and (12) his concession on the witness stand that he was "familiar with the reporting of capital gains".

All this in the aggregate constitutes, in our view, independent evidence of sufficiently substantial character, which in the language of **Opper**, tends "to establish the trustworthiness of the statement" in the Sansone affidavit. It "supports the essential facts admitted sufficiently to justify a jury inference of their truth". And it serves to fulfill the requirement of **Smith** that "All elements of the offense must be established by independent evidence or corroborated admissions".

We recognize that there is some force in the defense argument (1) that the Sansones made no attempt to con-

ceal through strawmen their participation in the real estate purchase and sales; (2) that federal documentary stamps in appropriate amounts were apparently utilized and, at least in one instance, were affixed prior to recording; (3) that the deeds were promptly filed for record; (4) that the Sunray transaction did not gross at more than Sansone's cost; (5) that Fish Pot Creek presented a serious pollution and route problem; (6) that Sansone was deeply concerned about this and reasonably anticipated the burden of a substantial capital expenditure for its solution; (7) that he also reasonably anticipated that the expenditure might consume all his available cash; (8) that the 1956 and 1957 returns, except for the real estate capital gains, were otherwise accepted as filed; (9) that his omitted income was confined to these two years, and did not create a pattern over a longer period; (10) that it is known that a request for a refund often leads to audit and thus contraindicates willfulness; (11) that the reported 1956 securities gains and losses were simple in character and did not involve cost allocation; and (12) that Sansone's real estate experience was not extensive and was with a very small firm. These factors and such potency as they possess are, however, for the trier of facts. They are not for us where there is substantial opposing evidence on which the jury's verdict may properly rest. That these factors did not convince the jury on the 1957 count is not a situation which we may undo on the record before us.

B. The lesser offense instructions. The defense claims prejudicial error in the trial court's refusal to charge the jury that it could find the defendant guilty of lesser crimes than the one charged by the indictment under § 7201. The statutes concerned are 26 U. S. C., §§ 7203 and 7207.

1. Section 7203. As we have noted, § 7201 is directed toward a willful attempt to evade or defeat any tax or its

payment. Section 7203 concerns a willful failure to pay a tax or make a return or keep records or supply information; violation thereof is a misdemeanor and lesser punishment ensues.

This court already has been confronted with this issue under both the 1939 and the 1954 Codes. In each instance it has been decided against the defense. **Dillon v. United States**, 218 F. 2d 97, 101 (8 Cir. 1955), cert. granted 349 U. S. 914 and dismissed 350 U. S. 906; **Janko v. United States**, 281 F. 2d 156, 164 (8 Cir. 1960), reversed on other grounds, 366 U. S. 716; **Foley v. United States**, 290 F. 2d 562, 567-69 (8 Cir. 1961), cert. denied 368 U. S. 888.

Although the issue is not an easy one, and although in **Foley**, pp. 568-69 of 290 F. 2d, we recognized that there may be situations where, under the evidence and § 7203, a defendant is entitled to lesser offense instructions, we conclude that this is not one of those situations. Here again the offense charged by the indictment was an affirmative act, namely, a willful attempt to evade tax by filing a false and fraudulent return in which taxable income was knowingly understated; it did not rest on something less than positive, such as mere willful failure to file or to pay. The trial court's instructions as to this distinction were carefully delineated. **Dillon, Janko,** and **Foley** are pertinently applicable to the facts of the present case and we adhere to our consistent rulings in those cases.

2. Section 7207. This is directed to the willful delivery or disclosure to a tax authority of any return known by the taxpayer to be fraudulent or false as to any material matter. It does not embrace in specific language, as did its antecedent, § 3616(a) of the 1939 Code, an intent to defeat or evade an assessment.

This issue, too, has been before this court and has been decided adversely to the defense. In **Janko v. United**

States, supra, pp. 164-67 of 281 F. 2d, we noted, among other things, that the lesser included offense question here was more complex than that presented by § 7203; that § 3616(a) had been held inapplicable to evasion of the income tax, **Achilli v. United States**, 353 U. S. 373 (1957); and that § 7207's positioning in the 1954 Code and a comment in the 1954 Committee Reports were of interest. Two of us concluded, for three stated reasons, that the defendant was not entitled to a lesser offense instruction under § 7207. Judge Matthes dissented on this one issue and relied in part upon prospective comments, seemingly sympathetic with his view, which has appeared in **Dillon v. United States**, supra, p. 103 of 218 F. 2d, and in **Berra v. United States**, 351 U. S. 131, 134, footnote 5 (1956).

The issue remains difficult and close, as we recognized in **Janko**, and it has not been settled by the Supreme Court. Unfortunately, from the point of view of desiring a definitive answer, the Supreme Court's reversal of **Janko**, at the suggestion of the Solicitor General, on grounds of prejudicial publicity, a point on which this court was unanimous, left the question open. We only note in passing that the Ninth Circuit seems to agree with the conclusion the **Janko** majority reached. **Redfield v. United States**, 315 F. 2d 76, 82 (9 Cir. 1963), cert. denied 369 U. S. 803. So long as the **Janko** holding on this issue remains unreversed on the books, we regard it as the law of this circuit.

Affirmed.

Matthes, Circuit Judge, Concurring

In concurring, I am constrained to add a few words in regard to the lesser offense instruction under 26 U. S. C., § 7207. In my dissenting opinion in **Janko v. United States**, 281 F. 2d 156, 171, I attempted to demonstrate that

§ 7207 was applicable to income tax returns. However, the failure of the Supreme Court to resolve this question in **Janko v. United States**, 366 U. S. 716, although afforded the opportunity to do so, may lend support to the belief that my position is untenable. At any rate, a continued expression of my views would be in disregard of established realities.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

Crim.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 17,399.

September Term, 1963.

Michael C. Sansone,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Michael C. Sansone, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence, imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

July 17, 1964.

Order entered in accordance with Opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Statutes.

26 U. S. C., §§ 7201, 7203, 7207 are as follows:

§ 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7203. Willful failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax

or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§ 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to section 6047 (b) or (c) to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Rule 31 (c) of the **Federal Rules of Criminal Procedure** is as follows:

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 365

MICHAEL C. SANSONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–34) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1964. (Pet. 34–35.) The petition for a writ of certiorari was filed on August 10, 1964. This Court's jurisdiction is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether petitioner was entitled to an instruction permitting the jury to find him guilty of violating § 7207 of the Internal Revenue Code of 1954 as a

lesser included offense in this prosecution for violating § 7201 of the 1954 Code.

2. Whether petitioner was entitled to an instruction permitting the jury to find him guilty of violating § 7203 of the 1954 Code as a lesser included offense in this prosecution for violating § 7201 of the 1954 Code.

3. Whether the government sufficiently corroborated the affidavit given by petitioner to the investigating agents.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
> (26 U.S.C. 1958 ed., Sec. 7201.)
>
> SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at

the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7203.)

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(26 U.S.C. 1958 ed., Sec. 7207.)

Federal Rules of Criminal Procedure:

Rule 31.

VERDICT

* * * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * *

STATEMENT

On January 30, 1963, a two-count indictment was returned in the Eastern District of Missouri charging

petitioner, Michael C. Sansone, with wilfully attempting to evade and defeat a portion of his and his wife's income taxes for 1956 and 1957 by filing false and fraudulent returns, in violation of § 7201 of the Internal Revenue Code of 1954. (R. Vol. 1, pp. 1–2.)[1] The first count charged petitioner with understating their taxable income of $5,012.59 for 1956, thereby wilfully attempting to evade and defeat $1,052.78 in income taxes for that year. The second count charged him with understating their taxable income of $10,144.89 for 1957, thereby wilfully attempting to evade and defeat $2,456.48 in income taxes for that year.

The jury found petitioner not guilty on Count One of the indictment, and guilty on Count Two. (R. Vol. 2, p. 317.) The court sentenced him to fifteen months imprisonment, and fined him $2,000. (R. Vol. 2, p. 321.)

Petitioner presently lives in Phoenix, Arizona, where he is engaged in running a small real estate office. (R. Vol. 2, p. 179.) During the indictment years he lived in St. Louis, Missouri, and worked as a salesman of stocks, bonds and real estate. (R. Vol. 2, pp. 182, 183, 209–210.) He held a real estate salesman's license from the State of Missouri during this time. (R. Vol. 2, p. 208.) On December 6, 1955, petitioner took an option to purchase a certain piece of land. (R. Vol. 2, p. 16.) He subsequently exercised that option and signed a contract to buy the property for $22,500. (R. Vol. 2, pp. 16–17.) On the

[1] "R." references are to the record certified to this Court, which record consists of four volumes.

same day that petitioner acquired the land, March 19, 1956, he sold a portion of it to D–X Sunray Oil Company for $20,000. (Pet. 20; R. Vol. 2, pp. 31–32.) On August 12, 1957, he sold another portion to Tremarco Corporation for $27,000. (Pet. 21; R. Vol. 2, p. 28.)

These transactions resulted in a short-term capital gain of $5,012.59 in 1956, and a long-term capital gain of $20,692.34 in 1957. (R. Vol. 2, pp. 60–67.) Petitioner did not report these capital gains in his 1956 and 1957 income tax returns, and they were not shown on the worksheets which he gave his brother-in-law to use in preparing their returns. (R. Vol. 2, pp. 40, 42–44, 64, 69.) Petitioner did report capital gains from stock transactions in 1956, and he admitted at the trial that he was familiar with reporting capital gains at that time. (R. Vol. 2, pp. 64, 208.) On May 5, 1960, petitioner signed an essentially exculpatory affidavit, in which, however, he admitted that he knew he should have reported the 1957 sale. (R. Vol. 2, pp. 104–107.)

ARGUMENT

1. The trial court was correct in refusing to instruct the jury that petitioner could be found guilty of the lesser included offense of wilfully filing a tax return which he knew to be false or fraudulent as to a material matter (R. Vol. 2, p. 316; R. Vol. 3, pp. 3–4). The court of appeals sustained this ruling (Pet. 33) on the ground that § 7207 of the 1954 Code does not apply to income tax returns. *Achilli* v. *United States*, 353 U.S. 373; *Janko* v. *United States*, 281 F. 2d 156, 164–167 (C.A. 8th), reversed on other

grounds, 366 U.S. 716; *Redfield* v. *United States*, 315 F. 2d 76, 82 (C.A. 9th). There is no occasion for this Court to consider this broader ground, for it is clear that, even if § 7207 did apply to income tax returns, a violation of that section would not be a lesser included offense vis-a-vis § 7201.[2]

Rule 31(c) of the Federal Rules of Criminal Procedure (*supra*, p. 3) is applicable in circumstances where Congress "has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more—in other words, a greater offense including a lesser". *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C.A. 1st). The rule states that a lesser included offense instruction is required where there exists a gradation of offenses, in which the lesser offense is "necessarily included in the offense charged". The greater offense must contain the same elements plus some aggravating ingredient not found in the lesser included offense, and the evidence must permit the jury to find the defendant not guilty of the greater offense but guilty of the lesser. See 1 Wharton, *Criminal Law* (12th ed., 1932), Section 33. Cf. *Dynes* v. *Hoover*, 20 How. 65, 79–80; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 63.

[2] In the *Achilli* case the Government indicated to this Court that it would institute no new prosecutions under § 3616(a) of the 1939 Code, the predecessor to Section 7207 of the 1954 Code. Memorandum for the United States filed in No. 834, October Term, 1956, p. 14, fn. 22; brief for the United States filed in Nos. 430 and 834, October Term, 1956, p. 14. In the intervening seven years the Department of Justice has not authorized a single prosecution under either section.

Although filing a false and fraudulent return is probably the most common method of violating § 7201 of the 1954 Code, it is certainly not the only one. For example, a taxpayer may file no return at all, and engage in such wilful conduct to conceal his tax liability that he may be convicted of a wilful attempt to evade his taxes. *Spies* v. *United States,* 317 U.S. 492, 497–499; *United States* v. *Kafes,* 214 F. 2d 887, 890 (C.A. 3d), certiorari denied, 348 U.S. 887. From this it is manifest that a violation of § 7207 is not "necessarily included" in a violation of § 7201; hence no instruction was required.

2. Nor did the trial court err in refusing to give a lesser-included-offense instruction as to § 7203. (R. Vol. 2, p. 316; R. Vol. 3, pp. 1–2.) The offenses proscribed by § 7203 are separate and distinct from those condemned by § 7201, each involving elements of proof not involved in the other.

As this Court pointed out in *Spies* v. *United States,* 317 U.S. 492, 499, the felony (§ 7201) involves "some willful commission" in contrast with the "willful omissions that make up the list of misdemeanors". The Third Circuit adverted to the separate nature of the two offenses in a case in which the taxpayer had been convicted of violation of *both* subsections (a) and (b) of § 145 of the 1939 Code—the predecessors of the present § § 7203 and 7201, respectively—*for the same year.* *United States* v. *Kafes,* 214 F. 2d 887 (C.A. 3d), certiorari denied, 348 U.S. 887. If a taxpayer is guilty of an act of *commission, e.g.,* filing a false return in a wilful attempt to evade his taxes, he is guilty under § 7201 although he has not violated § 7203. By

the same token, it is clear that a taxpayer could be guilty of all the acts of omission proscribed by § 7203 without having committed any affirmative act of evasion required to make out the felony. *Spies* v. *United States, supra,* pp. 498–499.

Moreover, the evidence in this case would not support petitioner's conviction under § 7203. There is no evidence here that petitioner had simply omitted to file a return, pay the tax due, or supply information. What this record shows is a "willful commission"—the filing of a fraudulent return containing false information and the payment of a part of the tax with the representation that no more was due.[8] No instruction should be given on a lesser offense where there is no evidence to justify it. *Davis* v. *United States,* 165 U.S. 373, 378–379; *Sparf and Hansen* v. *United States,* 156 U.S. 51, 63; *Chaifetz* v. *United States,* 288 F. 2d 133, 136 (C.A.D.C.), reversed on one count, 366 U.S. 209.

3. Petitioner imputes to the court below a holding that, since petitioner's affidavit (or "admission") was corroborated by independent evidence of failure to report income, there was no need for corroborating

[8] We fail to see how petitioner may try to rely (Pet. 10) upon a portion of his affidavit in support of his argument on this point, for at the trial he expressly denied (R. Vol. 2, pp. 200–201) having made these statements. Moreover, this statement does not support the instant contention, for it merely denies petitioner's intention to wilfully attempt to evade *payment* of his proper taxes. A wilful attempt to evade of a tax is a separate and different violation of Section 7201 from that which petitioner was charged, *viz.*, a wilful attempt to evade and defeat a tax. *Cohen* v. *United States,* 297 F. 2d 760, 769–770 (C.A. 9th), certiorari denied, 369 U.S. 865.

evidence as to that part of the affidavit which went to the issue of intent (*i.e.*, the statement that "I knew that I should have reported the 1957 sale.") It is plain, however, that the court below held no such thing. On the contrary, it explicitly, and correctly, ruled (Pet. 29) that "there is independent evidence in this record 'to corroborate and make trustworthy the appellant's admissions as to his *intent* with respect to his 1957 return' and that such independent evidence is 'truly substantial.'" (Emphasis added.) After listing twelve items of corroboration, the court concluded (Pet. 30):

> All this in the aggregate constitutes, in our view, independent evidence of sufficiently substantial character, which in the language of *Opper,* tends "to establish the trustworthiness of the statement" in the Sansone affidavit. It "supports the essential facts admitted sufficiently to justify a jury inference of their truth." And it serves to fulfill the requirement of Smith that *"All* elements of the offense must be established by independent evidence or corroborated admissions." [Emphasis added.]

We submit that the items enumerated by the court below constituted substantial independent corroboration of petitioner's admission of intent, that the court of appeals correctly so regarded them, and that the legal test it applied to this issue in no way differs from that applied by other courts of appeals.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1964.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 365.

MICHAEL C. SANSONE,
Petitioner,

vs.

UNITED STATES.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 365.

MICHAEL C. SANSONE,
Petitioner,

vs.

UNITED STATES.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 228-241) is reported at 334 F.2d 287.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 17, 1964 (R. 241). The petition for a writ of certiorari was filed August 10, 1964, and was granted October 26, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the willful delivery of a false tax return, a misdemeanor under Section 7207 of the Internal Revenue Code, is applicable to income tax returns, and if so, is it a lesser included offense within an indictment charging a felony violation of Section 7201 for attempting to evade income tax by filing a false and fraudulent return, so that a defendant thus charged may be entitled under Rule 31 (c), Federal Rules of Criminal Procedure, to a lesser offense instruction with respect thereto.

2. Whether the willful failure to pay one's income tax, a misdemeanor under Section 7203 of the Internal Revenue Code, is a lesser offense necessarily included within an indictment charging a Section 7201 felony of attempting to evade one's income tax by filing a false and fraudulent return, and whether a defendant thus charged is entitled under said Rule 31 (c) to a lesser offense instruction with respect thereto.

STATUTES INVOLVED.

Sections 7201, 7203, and 7207 of the Internal Revenue Code of 1954 (26 U. S. C. §§ 7201, 7203, 7207), Section 1001 of the Criminal Code (18 U. S. C. 1001), and Rule 31 (c) of the Federal Rules of Criminal Procedure are printed in the Appendix to this brief (p. 31). Also set forth therein are former Sections 145 (a), 145 (b) and 3616 (a) of the 1939 Internal Revenue Code.

STATEMENT.

Petitioner adopts the entire statement of facts as set forth in the opinion by the Eighth Circuit Court of Appeals (R. 228-234). The pertinent parts are reprinted below, with the addition of citations to the record:

> "Michael C. Sansone, age 41, after a plea of not guilty, was convicted by a jury of a willful and knowing attempt, in violation of 26 U. S. C., § 7201, to evade and defeat his federal income tax for the calendar year 1957. He had been charged in a 2-count indictment with a violation of this statute for both 1956 and 1957 but was acquitted as to 1956. Judge Harper imposed a $2,000 fine and a 15-month sentence. The defendant appealed.
>
> * * * * * * * *
>
> "The objective facts are not in dispute. Sansone and his wife in 1956 and 1957 lived in a Saint Louis suburb. They filed joint returns for both years. Their 1957 return as filed showed adjusted gross income of $7,585 and taxable income of $2,963. The income reported consisted of Mrs. Sansone's salary as a teacher, sums received by Mr. Sansone from the Department of the Air Force, and his net income as a securities salesman (R. 211). It was stipulated that the taxpayers earned and received these items in 1957 (R. 15). The return disclosed no capital gain or loss and no other income (Exhibit B, R. 211).
>
> "On December 6, 1955, Sansone obtained from House Hunters, Inc. an option to purchase certain land in Saint Louis County. In the following February he exercised this option and a contract for sale was signed. It ran from the vendor to the Sansones. It specified a price of $22,500, payable $17,500 in cash and $5,000 by a purchase money deed of trust on part of the real estate (R. 18-19).
>
> "Sansone at the same time effected a sale of a portion of the land to D-X Sunray Oil Company for

$20,000. Land Title Insurance Co. of St. Louis handled both Sansone's purchase and his sale to Sunray. It closed the two transactions simultaneously and issued the Sansones its check for $2,891.71 (R. 25). This was the amount remaining after appropriate charges and after debiting the Sansones for their $22,500 purchase price and crediting them for the $20,000 Sunray proceeds plus the deed of trust obligation. Both deeds were filed for record on March 21, 1956 (R. 106). This Sunray transaction resulted in 1956 gain which was not reported and which was the subject of the first and acquitted count of the indictment.

"In August 1957 Sansone sold another portion of his tract. This was to Tremarco Corporation and was for a gross price of $27,000 (R. 26). This time Land Title issued the Sansones its check for $21,671.67, representing the net payable to them after vendor's expenses and after payment of the amount due on the deed of trust (R. 26). The deed to Tremarco was immediately recorded (R. 106.) This Tremarco transaction resulted in 1957 gain which was not reported and which was the subject of the second and convicted count of the indictment.

"In summary and to repeat: The defendant purchased a tract of land in March 1956 for $22,500. He promptly sold a portion of the same land for $20,000. In 1957 he sold another portion for $27,000. The gains realized on these respective sales were not reported in the Sansone returns for 1956 and 1957.

"On the question of willfulness the government's case rested primarily upon the testimony of Steve Milosevich, of Revenue Agent John J. Conley, and of the defendant himself, and upon Sansone's own written statement hereinafter mentioned. Because of the difficulty and sensitivity of the issue, we review this evidence in some detail.

"Milosevich was Mrs. Sansone's brother (R. 34). He operated a delicatessen-sandwich shop (R. 33). He

had had some experience as a junior accountant (R. 33). He prepared the Sansones' 1956 and 1957 returns (R. 34). He testified that at the time he prepared the 1956 return he was "not sure" he had information that the Sansones 'had a real estate transaction' but 'I think at that time I may have been aware that there was' one (R. 35). He also said that he prepared the 1957 return from work sheets presented to him by the taxpayers; that there was no information on those sheets pertaining to any real estate transaction other than real estate taxes paid; that again he was 'not sure' whether he knew at the time he prepared the return that the Sansones had sold a piece of property; and that he learned about the real estate transaction through conversations with the Sansones but that he did not 'recall exactly when it was' (R. 36).

"Conley was a special agent with the Intelligence Division (R. 46). He and Agent Purk conferred with the Sansones in May 1960. They then lived in Phoenix, Arizona (R. 47). The agents saw the defendant at his home on three successive days beginning May 3 (R. 47). On May 5 Conley took from the defendant a written statement subscribed and sworn to by Sansone before Conley and denominated an affidavit (R. 74). This was prepared by Conley (R. 74). It was admitted into evidence at the trial over objection (R. 75). The statement twice recites that it was made voluntarily and goes on to state that the affiant understood it, that it was made without threat or promise of immunity, and that he had been advised as to his constitutional rights (R. 76-78). It further recites that the Sansones' returns for 1956 and 1957 (and for 1958) were prepared by Milosevich from work papers compiled by Mrs. Sansone, and

> 'I did not report the 1956 sale in our 1956 joint income tax return because I thought that I was entitled to recover my entire cost before reporting

any sales in my income tax returns. I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.

'My brother-in-law, Steve Milosevich, knew that we had this real estate and had made several sales, but he did not advise us whether or not to report the 1956 and 1957 sales and the matter was not discussed with him as he merely prepared the returns from the workpaper we gave him in these years' (R. 77).

"Conley testified that he adjusted the 1956 return to reflect the Sunray sale; that this was a short term capital gain; that he determined basis on the part sold by allocating to it a portion of the cost of the entire tract; that this allocation was based on assessed valuations approved by the Sansones on Land Title's closing statement; that he adjusted the 1957 return to include the long term capital gain on the sale to Tremarco; and that he used the assessed valuation method for determining basis of the Tremarco tract (R. 50, 51).

"On cross-examination Conley testified that there are a number of approved methods for apportioning cost; that when Agent Purk made allocations for the later actual payment of the tax he used a method based on front footage (R. 102); that the Sansones produced for the agents all the documents they requested, and made a place available for them in which

to work (R. 87); that, apart from the omission of the sales in the returns, he found no evidence that the defendant attempted to conceal any part of these transactions; that the checks the Sansones received were deposited without concealment (R. 86); that the affidavit did not cover all the discussions had with the Sansones; that they discussed Fish Pot Creek which ran through the real estate (R. 92); that, although the defendant was not present when the affidavit was typed, he had approved a rough draft and was given the opportunity to add anything he wished (R. 94); that he examined the Sansones' bank statements; that their May 1958 statement showed a balance of $9,286.74 (R. 98); and that Sansone had said he wanted to pay his tax (R. 105).

"The defense for the 1957 case is largely concerned with Fish Pot Creek. This stream ran through the Sansone property west of the portions sold to Sunray and Tremarco (R. 89-90). The claim is that Sansone was confronted with large capital expenditures required to correct conditions which the creek had created; that these expenditures would be far greater than any gain realized in the 1957 sale; that any meaningful development was necessarily delayed until the Missouri Highway Commission concluded its plans for improvements to Manchester Road which bordered the property at the south and under which the creek flowed; that Sansone honestly believed that he could wait until these expenditures were ascertained and then determine whether he had any gain on the entire tract; that, although he now knows this was erroneous, it nevertheless was an honest belief which he held when his returns were filed; and that he did not intend to avoid payment of any taxes (R. 112-114).

"In support of this defense Sansone himself took the stand. He testified that his own average income in 1954 through 1956 was around $3,000 to $3,200 annually (R. 127), that he desired to supplement this

by acquiring a piece of property to develop; that he first saw the land in question in the winter of 1955-56 when the creek did not appear unusual (R. 128); that during that winter he learned of the Commission's plans to widen Manchester Road and to straighten the creek (R. 128); that in the spring he found that the stream overflowed and contained raw sewage which created an odor and a mess; that he received many complaints that summer from the mayor (R. 129); that he consulted an architect in late 1956 to inspect the property and to see what could be done (R. 130); that he was repeatedly in touch with the Highway Commission to ascertain their plans but was never able to find out what they were (R. 130); that he did purchase the property and make the sales to Sunray and Tremarco; that he did not report the Sunray sale in his 1956 return because he had paid more for the property than the amount of that sale and thus had not recovered his cost (R. 131); that he was told it would take a minimum of $40,000 to correct the creek; that in 1957 the creek conditions were even worse (R. 133); that he received more complaints from the mayor; that he tried to fix the creek a little himself but was unsuccessful; that he often called the Commission but remained unable to get any definite information from them; that the mayor told him that he did not have the responsibility to fix the creek until the Commission produced its final plans (R. 134-135); that the 1957 return was prepared near the last day for filing in April 1958 (R. 135); that by then the Tremarco sale had been closed; and that he did not report that sale because he had been told he would have to fix the creek, because he felt the forthcoming substantial expenditure on that project was part of his cost, and because he honestly believed he didn't have to report the sales until he had recovered his entire anticipated cost (R. 135); he also testified that he had told Agent Conley of the

coming expenditure on the land; that it was not true, as stated in the affidavit, that he was burdened financially and could not raise money to pay any tax due; and that he was then better off financially than he ever had been (R. 136). He said that he told Conley the affidavit was not complete and that it contained inaccuracies (R. 139).

"An architect testified that Sansone had asked him to inspect the property; that he did so in the fall of 1956; that he quoted Sansone the $40,000 minimum figure; and that he also told him it would be 'stupid' to attempt this project until it was known exactly what the Highway Commission was going to do (R. 115-118). The mayor testified that the creek had been a constant source of complaint; that he talked with Sansone on numerous occasions and told him some corrective measures would have to be taken; that he himself had attempted to accelerate the development in that area; and that he told Sansone he did not expect him to make the permanent improvement until the Commission determined its plans (R. 156-158).

"A consulting engineer also testified for the defense. He, through a corporation, owned an interest in the property immediately across Manchester Road (R. 161). He told of necessary corrective measures which were required, of their cost, of discussing this problem with Sansone, and of the lack of positive information from the Commission" (R. 162-163).

Petitioner would add the following to the foregoing statement: defendant below requested the trial court to include in its charge two instructions on lesser offenses, as follows (R. 195-197):

"DEFENDANT'S REQUESTED INSTRUCTION No. 1

Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.

A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:

> 'Any person required under this title to pay any * * * tax, * * * who willfully fails to pay such tax, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor.'

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'

If you have a reasonable doubt as to whether defendant willfuly failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

"Defendant's Requested Instruction No. 2

As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:

> 'Any person who willfully delivers or discloses to the Secretary [of the Treasury] or his delegate any • • • return, • • •, • • • or other document known by him to be fraudulent or to be false as to any material matter,'

and then the statute provides for the penalty.

> Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri, his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'
>
> If you have a reasonable doubt as to whether defendant willfully so delivered under any count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

Both of these instructions were refused (R. 196, 197), to which defendant below specifically excepted (R. 140).

The Court of Appeals affirmed the trial court's action as to Defendant's Requested Instruction No. 1 on the ground that a Section 7203 Violation is not a lesser included offense in the instant indictment (R. 239). It affirmed as to the refusal of Defendant's Requested Instruction No. 2 on the ground that Section 7207 does not apply to income tax returns (R. 240).

SUMMARY OF ARGUMENT.

I.

As announced first by this Court in **Spies v. United States**, 317 U. S. 492, the felony of willful attempt to defeat and evade taxes, as now defined by Section 7201 of the Internal Revenue Code of 1954, may contain lesser offenses under the internal revenue laws. Whether or not the offense charged does contain lesser offenses depends primarily on the allegations of the indictment, and where such indictment charges an attempt to evade income tax by filing a false and fr udulent return, the lesser offense of wilfully filing a false and fraudulent return is necessarily included therein. This lesser offense, a misdemeanor under 7207 of the Internal Revenue Code, is applicable to income tax returns; the rule of **Achilli v. United States**, 353 U. S. 373, pertaining to the statutory predecessor of 7207 [Section 3616 (a) of the 1939 Code] no longer applies, because changes in the language and juxtaposition of the statute, and references to it by other sections of the code, make it clear that 7207 includes income tax returns. These changes in the 1954 code also eliminated the overlap between the misdemeanor and felony, which existed under the 1939 Code [Sections 3616 (a) and 145 (b)] and were pointed out in **Berra v. United States**, 351 U. S. 131; the present misdemeanor statute, Section 7207, does not require an intent to defeat or evade taxes as did former Section 3616 (a), so there is no possibility of overlap with the felony statute, Section 7201. In the instant case, the government's own evidence on intent reasonably supports a possible inference that defendant did not intend to defeat or evade his income tax, so under Rule 31 (c) a lesser offense instruction was required as to a possible 7207 violation.

II.

Section 7203 of the Internal Revenue Code, insofar as it proscribes the willful failure to pay a required tax, defines a misdemeanor necessarily included in an indictment charging the felony of attempt to evade income tax by filing a false and fraudulent return. A necessary element in such a felony charge is that some tax must be due and owing, and no tax can be due and owing unless there has been a failure to pay same. **Spies v. United States**, 317 U. S. 492, points out that mere dereliction (failure to pay a tax, failure to file a return, etc.) is but a misdemeanor; it is elevated to the felony by adding the aggravating ingredient of an attempt or intent to defeat or evade the tax. Hence, the instant indictment is a classic example of one containing a lesser included offense: (1) the lesser offense is a necessary element of the greater charge, and (2) the lesser offense is raised to the greater offense by the addition of an aggravating ingredient. The evidence here justified, pursuant to Rule 31 (c), a lesser offense instruction under Section 7203 because if the jury believed defendant's entire written admission it would have necessarily concluded that defendant willfully failed to pay his tax, but intended to pay same at a later date and had no intent to defeat or evade.

ARGUMENT.

I. Section 7207 of the Internal Revenue Code (Title 26, U. S. C.) is applicable to income tax returns, and defines a misdemeanor which necessarily is a lesser included offense in an indictment charging an attempt to defeat and evade income tax by filing a false and fraudulent return. Where the evidence justifies it, an instruction on this lesser offense is required in a prosecution for such income tax evasion.

The problem of lesser included offense instructions in tax evasion prosecutions is of relatively recent origin in this Court. The issue was first suggested in **Spies v. United States**, 317 U. S. 492, where a unanimous court noted, l. c. 497:

> "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue law."[1]

Thereafter, fate and circumstances seemed always to prevent a resolution of the issue by this Court. First, certiorari was granted in **Dillon v. United States**, 349 U. S. 914 (decision below at 218 F. 2d 97), in which the question was precisely raised, but petitioner died before the matter could be heard and certiorari was accordingly dismissed, 350 U. S. 906. Then came **Berra v. United States**, 351 U. S. 131, again raising the issue; but there, the lesser included offense urged was a violation of 3616 (a) of the 1939 Code (statutory predecessor, with some differences, of the present Section 7207), which was found to exactly overlap the felony section, 145 (b), so that the two re-

[1] The Court referred, by the term "this felony", to former Section 145 (b), Title 26 (Internal Revenue Code of 1939, 53 Stat. 63), statutory predecessor to Section 7201 of the present code.

quired identical elements. Therefore, held **Berra**, the issue was not one of a lesser included offense, but rather one of sentencing: could a felony sentence be imposed under an indictment charging acts which constituted a misdemeanor under 3616 (a) and/or a felony under 145 (b)? If this seemed to open the prison doors for the many tax evaders incarcerated under 145 (b) felony sentences, those doors were soon slammed shut by **Achilli v. United States**, 353 U. S. 373, which succinctly announced that 3616 (a) did not apply to income tax returns. The 1954 Internal Revenue Code then became effective, and **Janko v. United States**, 281 F. 2d 156 (8th Circ.), 164, holding that **Achilli** still applied, upheld the refusal of a lesser included offense instruction; certiorari was sought, but the Solicitor-General confessed error on another point and the case was summarily reversed at 366 U. S. 716. The instant case, therefore, is the first real opportunity for the Supreme Court to resolve the problem, and amplify the pronouncement in **Spies v. United States** that the tax evasion felony "may include one or several of the other offenses against the revenue law."

The instant case is a prosecution under Section 7201. Among the requested instructions sought by defendant below was an instruction that the jury might find defendant guilty of the misdemeanor under 7207 if it found that he willfully filed a false and fraudulent return, but without any "attempt to defeat and evade his income tax" (R. 196-197). The proffered instruction was refused (R. 197).[2] At the outset, it should be noted that

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[2] No discussion will be devoted to the necessity of giving a lesser included offense instruction whenever the offense charged and the evidence presented justify same. This point was not disputed by either the court below or the government. In fact, petitioner adopts, as the law on this matter, the statement of the Solicitor-General in his brief on the merits in *Berra v. United States*, 351 U. S. 131 (No. 60, October Term, 1955):

> "The basic principle to be extracted from the countless cases on the subject, which are mainly in the state courts, is that a

the infirmity found in **Berra v. United States**, supra, no longer exists; the misdemeanor and felony sections do not overlap. Section 7207, which replaced 3616 (a) of the 1939 Code, manifests significant changes in wording which eliminate the problem. Section 3616 (a) read:

> "Whenever any person . . . delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, **with intent to defeat or evade the valuation, enumeration, or assessment intended to be made** . . . he shall be fined not exceeding $1,000.00 or be imprisoned not exceeding one year, or both . . . ."

Section 7207 deleted from 3616 (a) the bold-faced phrase referring to an intent to defeat or evade. It added the words "known by him to be fraudulent or to be false as to any matter" and the word "wilfully" so that it reads:

> "Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, statement or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000.00 or imprisoned not more than one year, or both."

The significance of these changes is that they eliminate any need to prove under section 7207 the existence of a tax deficiency or a specific tax evasion intent. Thus, factual issues to be submitted to the jury under sections 7201 and 7207 of the 1954 Code are no longer identical as they were under sections 145 (b) and 3616 (a) of the 1939

'lesser concluded offense' instruction is *required* where there exists a gradation of offenses, in which the greater offense *alleged* contains the same elements plus some aggravating ingredient not found in the lesser included offense, and where the evidence permits the jury to find the defendant not guilty of the greater offense but guilty of the lesser" (Brief for the United States, p. 16) (Emphasis added).

Code. They no longer "cover precisely the same ground," see **Berra**, supra, 351 U. S. 134. The overlapping in all respects of Section 7207 with Section 7201 can no longer be advanced as a reason for Section 7207's inapplicability to income tax prosecutions and for denial of the lesser offense instruction under Rule 31 (c) of the Federal Rules of Criminal Procedure. The misdeameanor of section 7207 no longer covers precisely the same ground as the felony-evasion offense of Section 7201, and the misdemeanor is necessarily violated in any prosecution in which the means of attempted evasion is the filing of a false return. Depending on how the jury views the other evidence in a case, it may find the filing of a false return either a willful delivery of a return known to be fraudulent under the misdemeanor provisions of Section 7207, or an attempted evasion of income tax with the requisite specific intent under the felony provisions of Section 7201. Unlike **Berra**, the requested instruction here would have raised a separate factual issue under Section 7207, and the question is not simply one of proper sentencing.

In its opinion below (R. 240), the Eighth Circuit followed its prior holding in **Janko v. United States**, 281 F. 2d 156 (reversed on other grounds at 366 U. S. 716 as previously noted), that the statutory replacement of 3616 (a) of the 1939 Code by 7207 of the 1954 Code, including changes in language and juxtaposition of the particular section, did not destroy the applicability of **Achilli v. United States**, supra, and that the new Section 7207 still did not apply to income tax returns. The Solicitor-General, in his brief opposing certiorari in the instant case, did not base his opposition upon this argument, probably because he has already been committed to the contrary view. In opposing certiorari in **Dillon v. United States**, No. 629, October Term, 1954, the Solicitor's Brief (Foot Note 3, page 9, Brief for the United States in Opposition) conceded:

> "Although the holding of the Court below will to some extent impede the Government's policy of proceeding against minor offenders under the provisions of Section 3616 (a), the issue is one of steadily diminishing importance since Section 3616 (a) has been replaced by Section 7207 of the Internal Revenue Code of 1954 which, as the Court of Appeals agreed (Pet. 27), **clearly has application** to income tax returns." (Emphasis added.)

Your petitioner submits that the Solicitor's view is clearly the correct one, and that the Eighth Circuit's reasoning improperly ignores the innovations incorporated in the 1954 Code.

In this regard, the most compelling consideration is the reference to Section 7207 in other sections of the 1954 Code, indicating plainly that Congress intended that 7207 should apply to income tax returns. Section 7207 is specifically mentioned in Section 6013 (b) (5) (B) entitled "Joint Returns of Income Tax by Husband and Wife" for the purpose of clarifying the income tax criminal liabilities of spouses. The clear wording of Section 6013 (b) (5) (B) presupposes criminal liability for fraudulent income tax returns under Section 7207.[3]

Secondly, the location of Section 7207 in the 1954 Code in contrast to the positioning of Section 3616 (a) in the 1939 Code bolsters the conclusion that Section 7207 applies to income tax returns. Section 3616 (a) appeared under the heading "General Administrative Provisions" in

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[3] That this is even the Commissioner's view is seen in his Regulation 1:6013-2 (e) (2), reading as follows:

> "(2) For the purposes of Section 7206 (1) and (2) and Section 7207 (relating to criminal penalties in the case of fraudulent returns) the term 'returns' includes a separate return filed by a spouse with respect to a taxable year for which a joint return is made under Section 6013 (b) after the filing of a separate return."

the 1939 Code among several statutes covering a multitude of subjects other than income taxes. Section 7207 appears in the 1954 Code in Part I of Subchapter A of Chapter 75, entitled "Crimes, Other Offenses, and Forfeitures." It thus appears from the legislative scheme of the 1954 Code that all of the penalty measures in Part I of Subchapter A of Chapter 75, incorporating Section 7201 and other income tax crimes, including Section 7207, were intended to apply to any and all taxing provisions unless otherwise specifically indicated.

Finally, the specific change of wording in 7207, so that it no longer overlaps the felony statute, eliminates the reasoning and purpose of the **Achilli** holding. There, under the 1939 Code in which the 3616 (a) misdemeanor exactly overlapped the 145 (b) felony, this Court concluded that it would be ridiculous to contend that the most common method of tax evasion (filing a false return) might be a misdemeanor while lesser important methods of evasion must be felonies; hence 3616 (a) could not have been intended to apply to income tax returns. Now, however, Section 7207 is confined to wilfully filing a false or fraudulent return **absent** any attempt to defeat or evade the tax; it, therefore, can be clearly applicable to income tax returns without creating the incongruous situation referred to by Mr. Justice Frankfurter in **Achilli**.

The Solicitor-General, in opposing certiorari in the instant case, contends that filing a false and fraudulent return in violation of 7207 is not a necessarily included element of attempting to defeat or evade taxes as proscribed by 7201 (Brief of the United States in Opposition, P. 7). Other means, it is argued, can be used to attempt to evade taxes, such as failure to file any return plus "wilful conduct to conceal". The Solicitor then concludes that **every** violation of Section 7201 does not necessarily include a 7207 violation. What this argument overlooks is that in the instant case the specific charge **does** include

the filing of a false and fraudulent return. The very words of the indictment read (R. 2):

> "That . . . Michael C. Sansone . . . did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957, by filing and causing to be filed . . . a false and fraudulent joint income tax return. . . ."

Regardless of what other conceivable methods might be used to attempt to evade taxes, in this case Sansone is specifically charged with attempting to evade his taxes by filing a false and fraudulent return. Clearly under this indictment the lesser offense embodied in Section 7207 is included in the charge; in fact, if one strikes out the phrase "attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957," the remaining language of the indictment (with grammatical adjustments) charges precisely a violation of Section 7207. A clearer example of a lesser included offense is scarcely imaginable.

The Solicitor's argument further overlooks the plain implications of **Berra v. United States**, supra, that it is the indictment which constitutes the charge in any given case and which sets forth the facts which must be proven, while the statute merely fixes the penalties. Even the government's own arguments in the **Berra** case strongly contended that the allegations of the indictment are determinative of the offense charged, rather than the provisions of any statute:

> "In our view it was not the jury's function to decide which statutory provision was violated by petitioner, but only to determine whether the allegations of the indictment had been proven beyond a reason-

able doubt." (Brief for the United States, pp. 11-12, Berra v. United States, No. 60, October Term, 1955.)

Certainly it is clear, in deciding what offense is charged, that the instant indictment alone governs.[4] Thus, that in some other case at some other time, some other defendant might be charged with a tax evasion under 7201 which does not involve a false and fraudulent return, is all totally irrelevant. In the instant case, under the instant indictment, a 7207 violation was "necessarily included in the offense charged" within the meaning of Rule 31 (c), Federal Rules of Criminal Procedure, and a jury instruction to that effect should have been given.

The inconsistency of the government's position is further demonstrated by a reference to the Solicitor's brief in **Achilli v. United States**, supra (Nos. 430 and 834, October Term (1956). There the government hastened to argue that Section 1001, Title 18 (a general provision prohibiting false and fraudulent statements to any governmental agency) was clearly a lesser included offense in a tax evasion charge (Brief for the United States, pp. 30-31, in **Achilli**, supra):

> "It has been held that this offense, being but an 'incidental step in the consummation of the completed offense of attempted defeat or evasion of tax by means of a false and fraudulent return', is an offense included within the crime charged by the standard Section 145 (b) indictment form used in the instant case."

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[4] In that same brief in the *Berra* case, the Solicitor quoted with approval from *Williams v. United States*, 168 U. S. 382, 389:

> "It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force" (Brief for the United States, No. 60, October Term, 1955).

The footnote on Page 31 of that brief could virtually be adopted by the present petitioner as his brief on this point:

> "26. The determination of whether one offense is included in another rests upon a comparison of the elements of the two crimes. **Berra v. United States**, 351 U. S. 131, 133-134; cf. **Stevenson v. United States**, 162 U. S. 313. Here the allegation that petitioner filed a false and fraudulent return with the Collector of Internal Revenue (obviously a matter 'within the jurisdiction of [a] department or agency of the United States') charges a violation of Section 1001. The aggravating ingredient present in Section 145 (b) but lacking in Section 1001, is the willful attempt to evade the tax."

Thus we have an interesting paradox: in **Achilli**, while attempting to convince the Court that former Section 3616 (a) was not applicable to income tax returns, the government urged that filing a false and fraudulent return (under 18 U. S. C. 1001) **was** a lesser included offense in a charge of income tax evasion by false and fraudulent return. At present, however, Section 3616 (a) having been replaced by 7207 (which clearly is applicable to income tax returns, by the Solicitor's own prior admission), the government contends that filing a false and fraudulent return (under either Section 7207 or 18 U. S. C. 1001) is **not** a lesser included offense in an income tax evasion prosecution.

This inconsistency, petitioner submits, illustrates the inadequacy of the government's present position. Certainly the **Achilli** argument was correct, in that filing a false and fraudulent return is an obvious lesser included offense in any indictment charging tax evasion by a false and fraudulent return.

The only remaining consideration is whether the evidence of record requires the lesser offense instruction, for petitioner does not quarrel with the Solicitor's contention that "No instruction should be given on a lesser offense where there is no evidence to justify it" (Brief for the United States in Opposition, P. 6). In applying this principle, one must remember that the element which elevates a 7207 misdemeanor to a 7201 felony is an intent to defeat or evade taxes; no additional overt act is required. Thus, here the only overt act charged is willful filing of a false and fraudulent return; whether this is a misdemeanor or felony depends entirely on Sansone's intent; did he attempt and intend to defeat and evade his taxes? The main government evidence on the intent issue was the sworn statement of the defendant, the pertinent part of which reads as follows (R. 77):

> "I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. **It was my intention to report all sales in a future year and pay the tax due.** I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so" (Emphasis added).

Certainly if this constituted the government's evidence of intent (and indeed little, if anything, else appears in the record on this point), it at least raised a legitimate factual issue as to whether Sansone really intended to defeat and evade his taxes, or merely wanted to postpone payment to a later date. Moreover, substantial uncontroverted evidence was presented to refute any intent to defeat or evade taxes—evidence to which the court below conceded "there is some force" (R. 238). This evidence

is fairly summarized in the opinion below (R. 238, 239), and includes such facts as:

(1) Defendant made no attempt to conceal the taxable transactions and avoided use of straw parties (R. 21, 86);

(2) Federal documentary stamps in the proper amounts were affixed to all deeds (R. 21, 22, 31);

(3) All deeds were promptly recorded (R. 20, 86);

(4) Defendant reasonably anticipated future capital expenditures on the property which might use up all the gain he made (R. 131, 135);

(5) There was no consistent pattern of under-reporting income, and except for the two isolated instances of capital gain (for which he was indicted), defendant's returns were correct (R. 47, 50, 52).

This evidence, added to the exculpatory features of defendant's sworn statement, certainly created a substantial question as to the element of intent and justified the requested lesser offense instruction. It is quite conceivable that a properly charged jury might have found that Sansone did, in fact, willfully file a false and fraudulent return, but neither attempted nor intended to evade any tax, it being his intention to report all sales in a future year. Indeed, it was defendant's principal contention at the trial that, although under the law he should have reported the sale and capital gain, he was under the mistaken impression that he could delay such report until all of his anticipated capital expenditures had been ascertained (R. 114, 115). As the jury was actually charged, they could either disbelieve the **entire** defense and convict of the felony, or believe the **entire** defense and acquit completely. Not available to the jury was the middle ground, whereby they might have believed Sansone's sworn written admission ("I knew I should have reported the 1957 sale"), and also believed that **part** of

the defense showing that Sansone reasonably anticipated large capital expenditures on the property and intended to pay any taxes owing after these expenditures had been ascertained; under such a finding, of course, only conviction of a 7207 misdemeanor could result. Thus the failure to give the lesser offense instruction prevented a separate jury consideration of the various elements of defense, by compelling the jury to either accept or reject the proffered defense in its entirety, and acquit or convict of the felony accordingly—all without any consideration of the possibility that there lay therein the elements of the misdemeanor.

II. **Willful failure to pay a tax when due, a misdemeanor under Section 7203 of the Internal Revenue Code, is necessarily included in an indictment charging attempt to defeat and evade income tax, and a lesser offense instruction for same is required where the evidence justifies it.**

The other instruction offered by defendant and refused by the trial court pertained to a violation of Section 7203 as a lesser included offense in the felony charged, and charged that the jury, if they found that defendant "willfully failed to pay the correct tax" but did not attempt to defeat and evade his income taxes by filing a false and fraudulent return, should find defendant guilty of the misdemeanor under Section 7203 (R. 195-196).

Section 7203 of the 1954 Internal Revenue Code (Title 26, United States Code) is substantially the same as its statutory predecessor, Section 145 (a) of the 1939 Code. It lists various omissions any of which, if willfully done, constitutes a misdemeanor, including failure to make a return, failure to pay a required tax, failure to keep required records, and failure to supply information. Petitioner submits that, insofar as it proscribes the willful

failure to pay a required tax, Section 7203 clearly defines a lesser offense necessarily included in the 7201 felony of attempt to defeat and evade taxes.

The unquestionable authority on this issue is **Spies v. United States**, 317 U. S. 492 (cited with approval by the government in its Brief for the United States in Opposition, p. 7). After noting that the felony of attempting to evade taxes "may include one or several of the other offenses against the revenue laws" (317 U. S. at p. 497), the **Spies** opinion then elaborated with specific examples. The willful but passive neglect of duties under 145 (a), this Court observed, was a mere misdemeanor; but if combined with some affirmative act evidencing an intent to evade (such as keeping a double set of books, or making false entries, or concealing assets), the crime is lifted to the degree of felony under 145 (b) (now 7201) of the Code. In other words, as the opinion pointed out, in defining the felony "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors", 317 U. S. at p. 499. This, of course, defines **exactly** a greater offense and a lesser included offense under the traditional and uncontroverted authorities on the subject; as the solicitor argued in his brief opposing certiorari in the instant case, "The greater offense must contain the same elements plus some aggravating ingredient not found in the lesser included offense" (Brief of the United States in Opposition, p. 6). Here the basic dereliction, failure to pay a correct tax (or in **Spies**, the failure to file a return) is elevated to a felony when the "aggravating ingredient" of an attempt to evade is added. Section 145 (a) and 145 (b) in the **Spies** case, and Section 7203 and 7201 in the instant case, are thus classic illustrations of a gradation of offenses, where the lesser offense plus some additional element make up the greater offense, see **Dynes v. Hoover**, 20 How. 65, 79-80.

In its opinion below (R. 239-240), the Eighth Circuit attempted to justify refusal of the instruction on the ground that the felony charge embodied an affirmative act (filing a false and fraudulent return) and did not rest on "something less than positive," such as a mere failure to file a return. But this would be true in every 7201 prosecution, for as the **Spies** case points out, **some** affirmative act is always necessary to make out a felony. Hence under the reasoning of the Court below, a 7203 lesser included offense instruction could never be authorized in a 7201 prosecution, yet that Court admitted in **Foley v. United States**, 290 F. 2d 562, 568-569, and in its instant opinion (R. 239) that there may be certain instances where a defendant **is** entitled to a lesser included offense instruction under 7203. It is submitted that the attempt to make Sections 7203 and 7201 mutually exclusive, because they respectively involve omissions versus commissions, is totally inconsistent with the **Spies** holdings.[5]

In its brief opposing certiorari, the government argues that the failure to pay a tax is not necessarily involved in every 7201 felony prosecution:

> "If a taxpayer is guilty of an act of **commission**, e. g., filing a false return in a wilful attempt to evade his taxes, he is guilty under § 7201 although he has not violated § 7203" (Brief of the United States in Opposition, p. 7).

Petitioner submits that this premise is totally erroneous, and that **every** attempt to evade taxes which is a violation of Section 7201 must necessarily include a failure

---

[5] For example, if a defendant were charged with a 7201 felony, for failing to file a return plus the positive act of concealing his assets, certainly under *Spies* the lesser included offense of failing to file a return under 7203 would be involved. It would not be excluded as a lesser offense merely because it involves a mere omission, while the felony charge contained the affirmative act of concealment.

to pay the correct tax a violation of Section 7203. It is axiomatic, in tax evasion prosecutions, that an essential element for conviction is that **some** tax be due and unpaid; no defendant can be convicted under 7201 unless it is shown that some portion of the lawfully due tax is owing. This is the unqualified rule, without exception, throughout the various circuits; **Holt v. United States**, 272 F. 2d 272, 279 (9th Circ.); **Elwert v. United States**, 231 F. 2d 928 (9th Circ.); **United States v. Augustine**, 189 F. 2d 587 (3rd Circ.); **United States v. Schenck**, 126 F. 2d 702 (2nd Circ.); **Gleckman v. United States**, 80 F. 2d 394 (8th Circ.). See also Mertens, **Law of Federal Income Taxation**, Vol. 10, Section 55.37.

Furthermore, as the foregoing authorities agree, this rule is applicable regardless of how fraudulent a defendant's tax return may be, or how flagrant his concealment or other willful conduct may be.. Plainly and simply, no offense under Section 7201 is committed unless there has been a failure to pay the correct tax when due. This, it is submitted, is emphatic repudiation of the government's argument, and patently demonstrates that a failure to pay a given tax in violation of 7203 is necessarily included in any charge of attempting to evade that tax in violation of 7201. It is impossible to be charged with the latter without also being charged therein with the former.

It is submitted that the foregoing analysis of the interrelation of Section 7201 and 7203 establishes the two legal factors which are prerequisite to a lesser included offense instruction under appropriate indictment and proof, i. e., a gradation of offenses in which an aggravating ingredient added to the lesser offense elevates it to the greater offense, and a necessary commission of the lesser offense in every commission of the greater. All that remains for consideration is whether the evidence in the instant case justified the 7203 instruction. This issue is primarily concerned with the intent of defendant as proven by the

evidence: was it such that the jury might reasonably infer willfulness as to the failure to pay the correct tax, yet reject any willfulness in regard to an attempt to defeat or evade the tax? To answer this, one need look only to defendant's sworn statement given to the internal revenue agent (R. 75-78), which constituted the government's primary proof of intent. In this statement, defendant confessed that "I knew that I should have reported the 1957 sale" but added that he intended to report it in a future year and then pay the tax due, that he did not intend "to evade the payment of our proper taxes," and that he intended to pay any taxes due when he "was financially able to do so" (R. 77). Thus, this admission clearly supports a willful failure to pay, but actually denies a willful intent to evade or defeat. The willfulness is directed only toward a then-present failure to pay the tax, but is specifically denied as to any evasion or defeat of the tax. Under the circumstances, and in the total absence of any badges of fraud (double sets of books, concealment, cover schemes, etc.), a jury believing this admission in its entirety could well find defendant guilty only of the 7203 misdemeanor.

It is true, as the Solicitor-General points out (Brief of the United States in Opposition, p. 8, footnote 3), that Sansone, in his trial testimony, expressly denied having made the above statements to the agent (R. 138, 139). But this was a matter for the jury to decide; they may well have chosen to believe the entire statement, and disbelieve defendant's trial testimony repudiating the statement, in which event a 7203 conviction would have been proper. Certainly, if the verdict of conviction is any criterion, they did believe at least part of the statement (i. e., he knew he should have reported the 1957 sale) and disbelieved substantially all of Sansone's trial testimony; whether or not they believed the **entire** statement (i. e. exculpatory of the felony, but incriminating as to the misdemeanor—

that he intended to pay the tax due in a future year) can never be ascertained, in the absence of a lesser included offense instruction.

In any event, it is clear from the record that various combinations of jury conclusions and inferences were possible; it is equally clear that some of these combinations, had the jury been properly charged as to lesser included offenses, might have resulted in conviction only of the 7203 misdemeanor. Therefore, it must be concluded that the evidence did in fact justify a lesser offense charge, and that the trial court erred in refusing to give same.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the Court below be reversed, and the cause remanded for a new trial.

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APPENDIX.

Statutes.

Internal Revenue Code of 1954 (Title 26, U. S. C.):

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Sec. 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be

fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Criminal Code (Title 18, U. S. C.):

Sec. 1001. Statement or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure:

Rule 31. Verdict.

. . .

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or for an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Internal Revenue Code of 1939 (former Title 26, U. S. C.):

Sec. 145. Penalties.

(a) Failure to file returns, submit information, or pay tax. —Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax

imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. —Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Sec. 3616. Penalties.

Whenever any person——

(a) False Returns. —Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

* * * * * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

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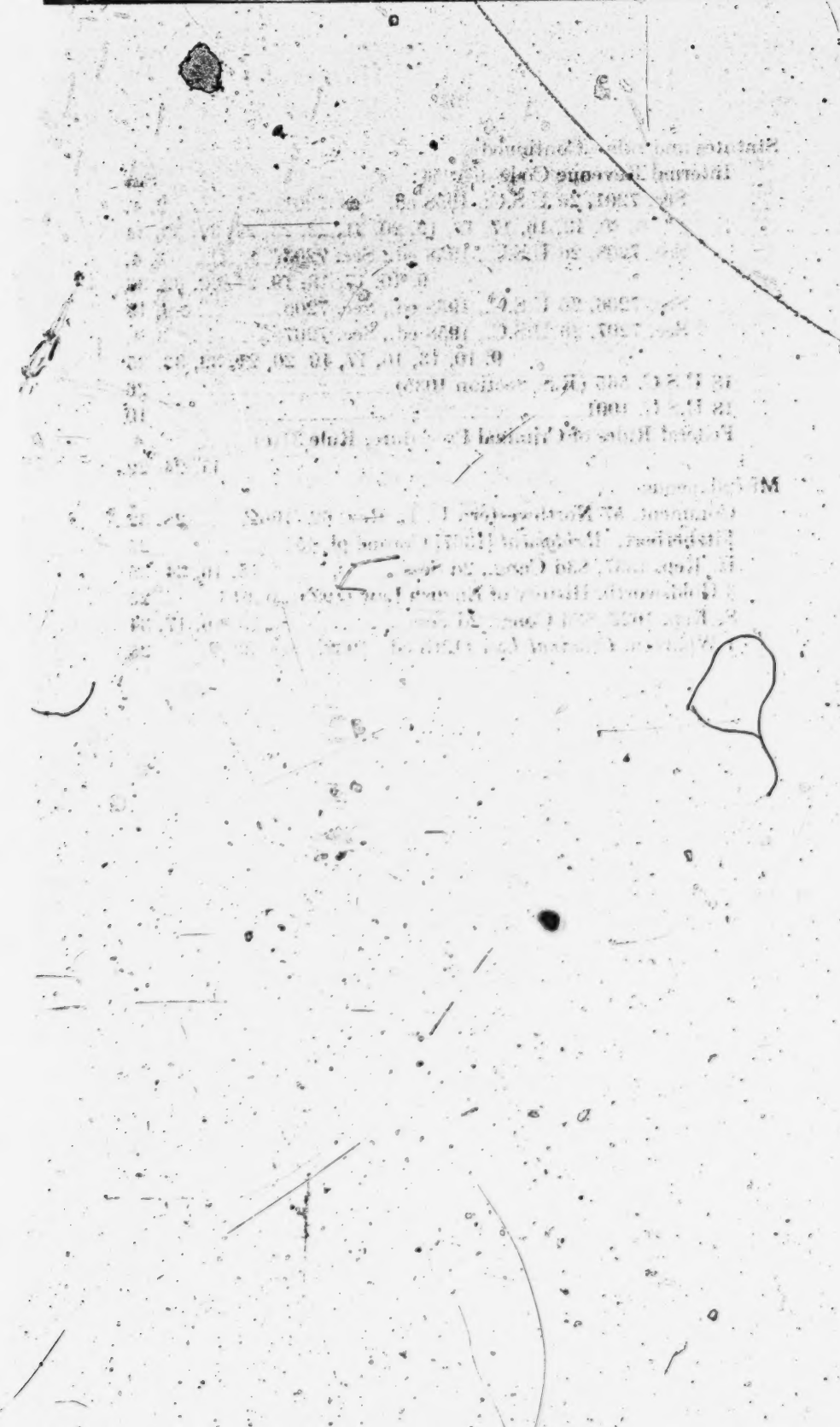

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 365

MICHAEL C. SANSONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the court of appeals (R. 228–241) are reported at 334 F. 2d 287.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1964. (R. 241.) The petition for a writ of certiorari was filed on August 10, 1964, and was granted on October 26, 1964, limited to the first two questions presented. (R. 242–243; 379 U.S. 886.) The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petition for certiorari was granted limited to the following two questions:

"1. Whether the willful delivery of a false income tax return, a misdemeanor under Section 7207 of the Internal Revenue Code of 1954, is a lesser included offense within Section 7201 thereof, making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31(c) of this Federal Rule of Criminal Procedure to a lesser offense instruction with respect thereto.

"2. Whether the willful failure to pay one's income tax, a misdemeanor under Section 7203 of the Internal Revenue Code of 1954, is a lesser included offense within Section 7201 thereof making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31(c) of the Federal Rules of Criminal Procedure to a lesser offense instruction with respect thereto."

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both,

together with the costs of prosecution. [26 U.S.C., 1958 ed., Sec. 7201.]

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. [26 U.S.C., 1958 ed., Sec. 7203.]

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

[26 U.S.C., 1958 ed., Sec. 7207.]

Federal Rules of Criminal Procedure:

Rule 31.

VERDICT.

* * * * * *

(e) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * * *

STATEMENT

On January 30, 1963, petitioner was indicted in the United States District Court for the Eastern District of Missouri on two counts charging that he willfully attempted to evade large parts of his income taxes for the years 1956 and 1957 by filing false and fraudulent returns. The violations were charged under Section 7201 of the Internal Revenue Code of 1954, which makes such conduct a felony punishable by a fine of up to $10,000, imprisonment of up to 5 years, or both. (26 U.S.C. 7201; R. 1–2). After a jury trial, petitioner was acquitted on Count I of the indictment, relating to 1956, and found guilty on Count II, relating to 1957. (R. 191.) On July 19, 1963, he was sentenced to pay a fine of $2,000 and to serve 15 months' imprisonment. (R. 192–193.)

The issues before this Court solely concern the right of petitioner to demand at trial that the jury be instructed that, if they did not find him guilty under Section 7201, they might alternatively find him guilty of violating either Section 7207 or Section 7203 of

the Code. (26 U.S.C. 7207, 7203). Those sections create misdemeanors rather than felonies: Section 7207 makes it a misdemeanor willfully to file a false return and carries a maximum penalty of a $1,000 fine, one year's imprisonment, or both. Section 7203 makes it a misdemeanor willfully to fail to pay a tax and carries a maximum penalty of a $10,000 fine, one year's imprisonment, or both. The trial judge refused to deliver the requested instructions and the court of appeals unanimously affirmed.

The evidence relevant for present purposes may be briefly summarized:[1]

In March 1956, petitioner and his wife purchased a tract of land near St. Louis for $22,500 (R. 15, 18–19, 128) and simultaneously sold a portion of the tract for $20,000 (R. 19–21, 28–29). In August 1957, petitioner sold another portion of the tract for $27,000 (R. 31–32). Petitioner did not report his capital gain on either the 1956 sale or the 1957 sale on his income tax returns for those years. (R. 131, 135, 143, 211.) The result of petitioner's omission of the 1957 capital gain from the joint income tax return of himself and his wife (the offense of which he was convicted) was that their income tax liability was declared as $592.79 (R. 211), when in fact the true amount was $3,105.29 (R. 79, 108), an understatement of $2,512.50. In an affidavit signed by petitioner during the Treasury investigation of his

[1] The evidence is also summarized in the opinion below (R. 229–234).

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returns, he explained his conduct as follows (R. 76–77; 231):

> * * * I did not report the 1956 sale in our 1956 joint income tax return because I thought I was entitled to recover my entire cost before reporting any sale in my income tax returns. I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.

At trial, petitioner repudiated this affidavit, stating that he had signed it because he feared that, if he did not, his wife might be prosecuted. (R. 137–140.) The defense he offered at trial was that he had not reported the 1957 gain because he feared that he might have to make extensive repairs in a creek adjoining the portion of the tract he still owned, and that the cost of those repairs might wipe out his profit. (R. 114–115, 135, 143.) Conceding that "the gain was realized, that it was not reported, and that it should have been" (court of appeals' opinion, R. 228), petitioner thus urged that at the time he made his return he did not believe that a tax was payable in consequence of the sale. While the jury apparently accepted this defense as to the 1956 sale (in

which respect it was consistent with petitioner's affidavit), it rejected it as to the 1957 sale.

The full instructions requested by petitioner were as follows (R. 195–197):

> DEFENDANT'S REQUESTED INSTRUCTION No. 1
>
> Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.
>
> A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:
>
> > "Any person required under this title to pay any * * * tax, * * * who willfully fails to pay such tax, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor,"
>
> and then the statute provides for the penalty.
>
> Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say "Guilty of violating a lesser-included offense."
>
> If you have a reasonable doubt as to whether defendant willfully failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the de-

fendant and acquit him of the lesser-included offense as to such count or counts.

DEFENDANT'S REQUESTED INSTRUCTION No. 2

As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:

> "Any person who willfully delivers or discloses to the Secretary [of the Treasury] or his delegate any * * * return, * * *, * * * or other document known by him to be fraudulent or to be false as to any material matter,"

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say "Guilty of violating a lesser-included offense."

If you have a reasonable doubt as to whether defendant willfully so delivered under any

count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Code contains five criminal provisions which, on the basis of their language, might conceivably be applied to taxpayers who deliberately commit income tax evasion through the submission of false returns. Four of these provisions appear in the Internal Revenue Code of 1954 (26 U.S.C.); one is in the Criminal Code (18 U.S.C.). (1) Section 7201 of the Internal Revenue Code makes it a felony willfully to attempt to evade a tax in any manner. It imposes a fine of not more than $10,000 and imprisonment of not more than five years, or both. (2) Section 7203 of the Code makes it a misdemeanor willfully to fail to pay a tax. It imposes a fine of not more than $10,000 and imprisonment of not more than one year, or both. (3) Section 7206(1) of the Code makes it a felony willfully to subscribe to a false document containing a declaration that it is made under the penalties of perjury. (The income-tax return contains such a printed declaration.) It imposes a fine of not more than $5,000 and imprisonment of not more than three years, or both. (4) Section 7207 of the Code makes it a misdemeanor willfully to file any document, including a return, which is known to be false as to a material matter. It imposes a fine of

not more than $1,000 and imprisonment of not more than one year, or both. (5) Section 1001 of the Criminal Code makes it a crime willfully to make a false statement or submit a false document to any agency of the United States. It imposes a fine of not more than $10,000 and imprisonment of not more than five years, or both.

This case concerns the application of three of the foregoing provisions: Sections 7201, 7203 and 7207 of the 1954 Code. The precise question is whether the petitioner, accused only under Section 7201, a felony provision, had the right to insist that the jury be instructed that he might alternatively be convicted under either of the two other provisions, creating misdemeanors and carrying lower maximum penalties. Petitioner's requested instructions were refused by the trial court. The jury then acquitted petitioner as to one of the two years in question and convicted him as to the other. He was sentenced to pay a $2,000 fine and to serve 15 months' imprisonment. This sentence was greater than would have been permissible under either of the misdemeanor provisions standing alone.

Closely related issues were before the Court in the mid-1950s in two cases arising under provisions of the Internal Revenue Code of 1939. In *Berra* v. *United States*, 351 U.S. 131, the petitioner had been indicted and convicted under Section 145(b) of the 1939 Code for filing a false return with intent to evade the tax. Section 145(b) was the counterpart of Section 7201 of the 1954 Code (although Section 145(b) applied only to income tax evasions while Section 7201 is gen-

erally applicable to evasions of all taxes imposed by Title 26). The petitioner in *Berra*, like petitioner here, requested and was refused an instruction that he might alternatively be convicted under Section 3616 (a) of the 1939 Code, a section making the submission of a fraudulent statement or return with intent to evade tax a misdemeanor and carrying a much lower maximum penalty than Section 145(b). The Court assumed that Section 3616(a) was applicable to income tax evasions practiced through fraudulent returns. It also assumed that, as a general rule, a defendant would be entitled, under Rule 31(c) of the Federal Rules of Criminal Procedure, to an instruction on an offense not charged in the indictment if "the evidence justified" the conclusion that "some of the elements of the crime charged themselves constitute a lesser crime." 351 U.S. at 133–134. The Court nevertheless held (Mr. Justice Black and Mr. Justice Douglas dissenting) that it had been proper to refuse the requested instruction. The Court found that, in the light of the evidence at the trial, there was no way in which the jury in *Berra* could rationally have found the facts necessary to convict of a violation of Section 3616(a) without also convicting of a Section 145(b) violation; in the factual context, the elements of the two offenses were identical. Thus, "the instruction requested by petitioner would not have added any [factual] issue for the jury's determination. When the jury resolved those issues against petitioner, its function was exhausted, since there is here no statutory provision giving to the jury the right

to determine the punishment to be imposed after the determination of guilt." 351 U.S. at 134–135.

Achilli v. *United States*, 353 U.S. 373, was decided one year after *Berra*. Like *Berra* and the present case, it was a prosecution for a willful attempt to evade income taxes through a fraudulent return. Again, the only offense charged was the felony of willful evasion. However, Achilli, unlike Berra and the instant petitioner, did not challenge the failure to give an instruction as to lesser offenses. Rather, he challenged his sentence, which was within the maximum limits set by Section 145(b) but greater than the maximum which would have been permitted had conviction been solely under Section 3616(a). The Court did not reach the sentencing issue thus presented. Instead, it responded to the government's invitation to reconsider the assumption which had been made in *Berra*, *i.e.*, that Section 3616(a) could be used to prosecute unlawful income tax evasions. After consideration of the history of Section 3616(a), the Court concluded (Mr. Justice Black and Mr. Justice Douglas again dissenting) that Section 3616(a), despite the fact that it was literally applicable, should not be read to cover cases of income tax evasion. Congress had impliedly repealed the misdemeanor sanction in such cases and substituted the Section 145(b) felony. As a result, petitioner had no claim to have his sentence measured by Section 3616(a), and the sentence was affirmed. In consequence of the *Achilli* decision, the government abandoned all pending prosecutions under Section 3616(a). After *Achilli* it initiated no new prosecutions under that section and it has initiated no misde-

meanor prosecutions of fraudulent income tax returns under Section 7207 of the 1954 Code.

In the 1954 Code, certain changes were made in the relevant criminal provisions applicable to false returns and tax evasions. We discuss their effect in the first part of our argument. Specifically, in the 1954 Code the misdemeanor provision applicable to false returns (Section 7207) does not duplicate the general felony provision (Section 7201) in requiring evasion to be proved. We submit that on the basis of these explicit legislative changes it is even clearer than it was under the 1939 Code (where the result reflected in the *Achilli* decision could be reached only through an examination of history) that Congress regarded willful evasion of income taxes only as a felony and that the misdemeanor provisions of the 1954 Code are applicable only when evasion is not established. Where the felony is charged and proved, therefore, there is no room for a contention that the jury has an option under the Code to treat the offense as either a felony or a misdemeanor.

Turning from the question of Congressional purpose to the general principles of the criminal law, we show that petitioner was not entitled to the requested misdemeanor instructions in this case. Such an instruction is available only when, on a reasonable view of the evidence, the defendant may be found guilty of the included offense while being acquitted of the offense charged. In this case, however, the jury could not have found petitioner guilty of either of the two misdemeanors as to which he requested instructions without concluding, of necessity, that the felony of income tax evasion was also committed.

ARGUMENT

I. THE STRUCTURE AND HISTORY OF THE 1954 CODE PRECLUDE A CLAIM THAT CONGRESS PROPOSED TO GRANT JURIES AN OPTION TO PUNISH ONE CHARGED WITH AND FOUND GUILTY OF WILLFUL EVASION OF INCOME TAXES EITHER AS A FELON OR AS A MISDEMEANANT

We deal first with the special contention, seemingly reflected in the petitioner's brief and in the dissenting opinions in both *Achilli* v. *United States*, 353 U.S. 373, and *Berra* v. *United States*, 351 U.S. 131, that the structure of the Internal Revenue Code reveals a Congressional intention to provide the jury in tax evasion cases with the option to treat a proved evasion as a misdemeanor rather than as a felony as charged. We submit that, whatever doubts may have been present on that score under the 1939 Code, they have been wholly and clearly resolved against such jury discretion in the 1954 Code.*

In *Achilli* v. *United States*, 353 U.S. 373, this Court held Section 3616(a) of the Internal Revenue Code of 1939 inapplicable to all willful evasions of the income tax, despite the fact that Section 3616(a) in terms made it a misdemeanor for any person to deliver to the Collector "any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * *." The Court recognized that the original predecessor to Section 3616(a) had been enacted as a general provision applicable to evasion of federal taxes, including the earliest income taxes, through fraudulent documents. It found, however,

* As we show *infra*, pp. 19-35, petitioner's claim is also precluded by general principles relating to included-offense instructions.

that with the enactment of the income tax legislation which followed the passage of the Sixteenth Amendment, Congress had enacted specific penalties for willful income tax evasion more severe than those provided by Section 3616(a)'s predecessor. Section 145(b) of the 1939 Code, creating a felony of income tax evasion, regardless of the means used to evade, was the successor to these evasion provisions. The Court held that these subsequent enactments constituted repeals, *pro tanto*, of the predecessor of Section 3616(a), making it no longer applicable to income tax evasions. The Court further found, despite Section 3616(a)'s subsequent inclusion in the 1939 Code, that no legislation had revived the application of Section 3616(a) to income tax evasion cases. *Achilli* thus held that, by the time of the 1939 Code, the government was not entitled to proceed by way of information under the misdemeanor section in cases involving fraudulent returns, where the acts charged, if true, necessarily constituted the felony of income tax evasion. In such cases, the government was compelled to proceed by indictment (unless that safeguard was waived) if it wished to bring criminal charges at all and the jury, while it might either convict or acquit of the felony, had no option to treat the defendant as a misdemeanant.

In the 1939 Code, separate criminal provisions applied to the various taxes imposed by the several chapters. The expressed congressional purpose of the 1954 revision was to bring criminal offenses together in one chapter of the Code (Chapter 75) through provisions of general applicability. S. Rep. 1622, 83d Cong., 2d Sess., p. 147; H. Rep. 1337, 83d

Cong., 2d Sess., p. 108. We submit that, in doing so, Congress intended no change from the prevailing policy that acts amounting to evasions of the income tax should be prosecuted and judged exclusively as felonies upon grand jury indictment. Indeed, the legislative history shows an affirmative purpose uniformly to treat tax evasion as a felony.

In their general commentary upon Chapter 75 of the 1954 Code, the House and Senate Reports accompanying the 1954 Code revision stated that one of its principal objectives in revising and bringing together the various criminal tax provisions was to provide "uniform penalties * * * instead of the varying penalties now provided for what in substance is the same offense, namely, the attempt to evade the tax. For offenses of this type, the penalties usually provided by the new provisions are fines of up to $10,000 or imprisonment up to 5 years or both [the penalties provided by Section 7201, the felony provision under which petitioner was prosecuted]. Minimum penalties, however, are omitted. Thus it will be possible for the judges to better fix the penalties to fit the circumstances." H. Rep. No. 1337, *supra*, p. 108. (The Senate report contains the same language except for the last sentence quoted.)

The legislative history directed to the specific sections under which petitioner claimed instructions in this case also indicates that conduct necessarily amounting to income tax evasion was to be treated exclusively as a felony. Both House and Senate Reports state that Section 7207 "contains no material change from existing law." H. Rep., *supra*, p. A425;

S. Rep., *supra*, p. 403. Section 7207 prohibits the same fraudulent statements as did Section 3616(a) of the 1939 Code—with the change that, under Section 7207, the requirement of a tax evasion, present in Section 3616(a), has been eliminated. Since Section 3616(a) did not apply to conduct necessarily amounting to an evasion because of the presence of a felony section applying to the same conduct, it would seem clear that Section 7207, creating an offense less serious than evasion when evasion is not proved, is similarly inapplicable in the presence of Section 7201, a felony section specifically directed toward evasion of taxes. As to Section 7203, prohibiting the willful failure to do certain acts, the Senate Report, *supra*, p. 601 (whose version of the section was ultimately adopted by both Houses) states:

> Under existing law, it is a misdemeanor (with maximum punishment of $10,000 fine and 1 year imprisonment) willfully to fail to make a return at the time required by law or regulations. * * *
>
> The bill as reported by your committee amends * * * section 7203 so as to continue in effect the existing law with respect to the nature of, and the punishment for, the offense of a willful failure to make a tax return. Under these amendments, section 7201 will apply only to a willful attempt in any manner to evade or defeat the tax or the payment thereof, and the lesser offense of a willful failure to file a tax return will be punishable as a misdemeanor under section 7203.

Again, the intention to treat tax evasions under Section 7201 rather than under Section 7203 is evident.

In sum, the 1954 Code effectively achieves a sufficient system of criminal tax penalties. The primary provision in Section 7201, "the imposition of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency,"[4] *Spies* v. *United States*, 317 U.S. 492, 497. This section makes it a felony willfully to evade tax "in any manner." Both an affirmative act of evasion (*Spies* v. *United States*, *supra*) and a resulting tax deficiency (*Lawn* v. *United States*, 355 U.S. 339, 361) are required under this Section. When charges are made which, if true, would necessarily amount to such an evasion of tax, this felony provision governs. The remaining provisions of Chapter 75 are applicable where guilt may be demonstrated without simultaneously and necessarily demonstrating an evasion of tax. Thus, Section 7203, a misdemeanor, may apply, for example, where the defendant simply fails to pay his tax or to file a return, but is guilty of no affirmative act of evasion as required under Section 7201. Section 7206(1), a felony carrying lower maximum penalties than Section 7201, may be used where a taxpayer willfully subscribes to a false return containing a declaration that it is made under the penalties of perjury, but where such false statement, although material, does not constitute an evasion because it does not have the effect of reducing the tax liability.

[4] The statement was made with respect to Section 145(b), Section 7201's predecessor under the 1939 Code; but it is equally applicable to Section 7201's role in the 1954 Code.

This may be the case, for example, where there is some offsetting error in the fraudulent return which works to taxpayer's disadvantage, thus cancelling the deficiency, or where the fraud concerns the source, rather than the amount, of taxable income. Finally, Section 7207, a misdemeanor section carrying relatively minor penalties, applies where there is material fraud, but no evasion, and where the fraudulent statement may or may not contain a written declaration that it is made under the penalties of perjury. To repeat, however, if the charge and proof, if true, necessarily show a felonious evasion of tax under Section 7201, that section alone defines the offense and the penalties.[4]

II. WHERE, AS IN THIS CASE, THE EVIDENCE COULD NOT BE FOUND TO SHOW A LESSER OFFENSE WITHOUT ALSO ESTABLISHING THE GREATER, AN INSTRUCTION AS TO INCLUDED OFFENSES IS UNWARRANTED

We have shown above that there is no feature of the 1954 Code which would justify an inference that Congress proposed to confer upon a jury sitting in a prosecution for the felony of tax evasion the special

[4] The prosecutorial policy of the Department of Justice is in keeping with the views expressed above. Before *Achilli* v. *United States*, Section 3616(a) had been used in relatively few income tax evasion cases. When the government suggested to the Court in *Achilli* v. *United States* that Section 3616(a) was inapplicable to income tax evasions, it abandoned all prosecutions under that Section and undertook to redress punishments already administered. Since *Achilli*, the Department has authorized no prosecutions under either Section 3616(a) or Section 7207 of the 1954 Code. Nor does the Department authorize prosecuting under Section 7203 when an affirmative act of evasion is charged.

prerogative of reducing the offense to a misdemeanor, albeit all the elements of the felony are proved. There remains the question whether, under the general principles of the criminal law, there was basis for the requested instructions as to lesser included offenses. Our answer is in two steps: *first*, that on the evidence presented, the jury in this case could not rationally find that petitioner was guilty of the tax offenses in relation to which he requested instructions without also concluding that he was guilty of evasion; *secondly*, that since the rule governing instructions on lesser included offenses requires that the jury could reasonably conclude that the lesser, but not the greater, offense was committed, the instructions were properly refused.

A. IF THIS PETITIONER WAS GUILTY OF A TAX OFFENSE, HE WAS NECESSARILY GUILTY OF EVASION

Section 7201 makes it a felony willfully to attempt to evade a tax in any manner. The elements of this offense are (1) the existence of a tax deficiency (*Lawn* v. *United States*, 355 U.S. 339, 361); (2) an affirmative act constituting an evasion or attempted evasion of that tax (*Spies* v. *United States*, 317 U.S. 492); and (3) willfulness. On the other hand, the elements of a Section 7207 offense (to which we first turn) are (1) the filing of a document false as to a material matter and (2) willfulness. The ingredient of aggravation present in an offense under Section 7201, but lacking in a Section 7207 violation, is the existence of a tax liability in addition to that reported on the return. It is thus possible for Section 7207 to

be violated without a simultaneous violation of Section 7201 only should fraud exist, but no tax deficiency be present.[5] That possibility was entirely excluded in this case. Petitioner concedes the existence of a tax deficiency as the result of his understatement of income on his 1957 return. (R. 228). If this understatement was fraudulent, the felony of evasion was committed; if it was not, petitioner was innocent of both the felony and the Section 7207 misdemeanor. There is no intermediate possibility. It necessarily follows that there was no possible view of the evidence on which the jury could have found that petitioner had willfully filed a false return without simultaneously finding an evasion constituting a violation of Section 7201.

Similar analysis shows the inapplicability of Section 7203 to this case. The essential elements of the offense of willful failure created by Section 7203 are (1) the existence of a tax liability; (2) the failure to perform one of a number of specified acts at the time required by law; and (3) willfulness. As this Court pointed out in *Spies* v. *United States*, 317 U.S. 492, 499, the felony (now Section 7201) involves "some willful commission" in contrast with the "willful omissions that make up the list of misdemeanors."[6] Section 7203

[5] We gives examples of such cases, *supra*, p. 19.

[6] "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." *Id.* at 499.

is violated without a necessarily simultaneous violation of Section 7201 by a taxpayer who merely fails to act, without committing any affirmative act of evasion. On no view of the evidence was that this case. Petitioner's only failure here was his failure to report a portion of his income on his 1957 return. If this failure was willful, he filed a fraudulent return constituting a willful evasion under Section 7201; if this failure was not willful, he was innocent of both the felony and the Section 7203 misdemeanor. Again, there was no intermediate possibility.

In his brief in this Court, petitioner urges (Br. 23–25) that the jury might have accepted the explanation in his affidavit, *supra*, p. 6, that he had understated his 1957 income because he could not raise the money to pay the tax, but that he intended "to report all sales in a future year and pay the tax due" (Br. 23). Thus, petitioner suggests that, under the evidence, the jury might rationally have found him guilty of willfully filing a false return or willfully failing to pay his tax, without simultaneously finding him guilty of evasion. For the purpose of this argument, petitioner assumes that evasion is not made out if the jury believes that the taxpayer intended to pay "in a future year."

In reply, we point out, first, that petitioner's entire trial theory was based upon a repudiation of his affidavit, which was the only evidence supporting the contention that he intended to pay in a future year (*supra*, p. 6; R. 114–115; 137–140). Petitioner was not entitled to an instruction on a theory thus expressly repudiated at trial. See *United States* v.

Rutkin, 189 F. 2d 431 (C.A. 3), affirmed, 343 U.S. 130; *Samish* v. *United States*, 228 F. 2d 358 (C.A. 9); *Ciullo* v. *United States*, 325 F. 2d 227, 229 (C.A.D.C.).

Second, and more important, petitioner misconceives the nature of the offense under Section 7201 charged in the indictment. No defense to a Section 7201 evasion charge would be made out by demonstrating to the jury's satisfaction that petitioner willfully and fraudulently understated his tax liability with the intention to pay in a later year. This Court has recognized the sharp distinction between an attempt to defeat the *assessment* of a tax and an attempt to defeat its *payment*. *Lawn* v. *United States*, 355 U.S. 339, 341–342 and fn. 1, 361.[1] This indictment, like that in the great majority of criminal tax cases, alleges a willful attempt "to evade and defeat a large part of the income tax due * * * for the calendar year 1957, by filing * * * a false and fraudulent joint income tax return" understating taxable income and income tax in stated amounts. (R. 2.) This, of course, is an allegation of an attempt to evade the tax by defeating the *assessment* for 1957. The fact, even if believed, that petitioner intended to report his 1957 income in some future year would not detract from the criminality of this willful act defeating the 1957 assessment. That crime is complete as soon as the false

[1] Prosecutions for attempts to defeat the payment of an income tax already assessed are comparatively rare. But see *Lawn* v. *United States*, *supra*; *Cohen* v. *United States*, 297 F. 2d 760, 769–770 (C.A. 9), certiorari denied, 369 U.S. 865; *United States* v. *Bardin*, 224 F. 2d 255 (C.A. 7), certiorari denied, 350 U.S. 883.

and fraudulent return is filed.[8] *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *United States* v. *Troy*, 293 U.S. 58; *Holland* v. *United States*, 348 U.S. 121, 125, 139; *Cave* v. *United States*, 159 F. 2d 464, 466 (C.A. 8); *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1); *United States* v. *Croessant*, 178 F. 2d 96 (C.A. 3), certiorari denied, 339 U.S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C.A. 7); *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C.A.D.C.). Thus the government relied upon petitioner's affidavit at trial precisely because it showed a Section 7201 violation; and petitioner repudiated the affidavit for the same reason.

B. IN THESE CIRCUMSTANCES, NO INSTRUCTION AS TO INCLUDED OFFENSES WOULD HAVE BEEN PROPER

Petitioner invokes the so-called included offense rule embodied in Rule 31(c) of the Federal Rules of Criminal Procedure. That Rule provides:

> VERDICT
>
> * * * * *
>
> (c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.
>
> * * * * *

[8] "This [a willful attempt to evade the tax] is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder." *Spies* v. *United States*, 317 U.S. 492, 498–499.

Under the settled case law, however, the Rule applies only when the jury can rationally acquit the defendant of the charged offense while, at the same time, finding the necessary elements of an included offense. It is wholly inapplicable in a case like this one where a conviction on the included offense would necessarily presuppose a finding of guilt on the charged offense.

Rule 31(c), "a restatement of existing law,"[9] derives from principles to be found very early in the development of the common law.[10] Congress first gave these principles statutory recognition in 1872; the text of Rule 31(c) contains no relevant change from this enactment and its successors.[11]

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[9] The quotation is from the notes of the Advisory Committee for the Federal Rules. See *Berra* v. *United States*, 351 U.S. 131, 134–135 fn. 6.

[10] We are told by Holdsworth that in order for jurors to "well and truly try and true deliverance make between * * * the king and the prisoner" it was "their right to find the prisoner guilty of a lesser charge than that with which he is accused." 3 Holdsworth, History of English Law (1923), p. 613. In a prosecution for grand larceny in 1367, for example, the jury brought in a general verdict of guilty together with a special verdict assigning a lesser value than charged for the goods stolen, thereby reducing the offense from grand to petty larceny. Fitzherbert, *Abridgment*, Corone pl. 451 (1367). And see *Salisbury's Case* [1553] Plowden, 100, 101, 75 Eng. Rep. 158, 160; *Mackalley's Case* [1611] 9 Co. Rep. 61b, 77 Eng. Rep. 824; *Respublica* v. *Roberts*, 2 Dall. 124 (Pa., 1791). See also 1 Wharton, *Criminal Law* (12th ed., 1932), Sec. 33. The common-law rule was applied by this Court in 1857 in *Dynes* v. *Hoover*, 20 How. 65, 79–80.

[11] The 1872 statute (Act of June 1, 1872, Sec. 9, c. 255, 17 Stat. 196, 198) provided:

> That in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily

The included offense rule as thus developed gives either the prosecutor or the defendant the right to an instruction asking the jury to consider the defendant's guilt, in relation not only to the offense actually charged, but also in relation to a so-called included offense, *i.e.*, an offense requiring less proof than the charge, but one containing only elements which are included within the charge. Thus, under a charge of aggravated assault, the prosecution may apprehend an inability to convince the jury of the existence of the element of aggravation, while the existence of a simple assault is supported by strong proof. In such a circumstance the prosecution may properly request an instruction that the jury may convict for the included offense of assault if they do not find the aggravating elements but nevertheless find the elements of an assault without aggravation.[12] The prin-

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included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged: *Provided*, That such attempt be itself a separate offence.

This provision was incorporated into the Revised Statutes as Section 1035, and appeared in the 1934, 1940, and 1946 editions of the United States Code as 18 U.S.C. 565, the only change in language being the substitution of the word "if" for the words "*Provided*, That."

[12] A few familiar illustrations of application of the doctrine follow. A defendant charged with false pretenses may be convicted of passing a bad check. *Ciullo* v. *United States*, 325 F. 2d 227 (C.A.D.C.). A defendant charged with murder may be convicted of manslaughter if the jury finds an absence of malice. *Stevenson* v. *United States*, 162 U.S. 313, 315–316, 321–323. A man charged with robbery may be found guilty of larceny, for robbery is aggravated larceny. *Lamore* v. *United States*, 136 F. 2d 766 (C.A.D.C.). A defendant indicted for

cipal limitation upon the prosecutor's right to such an instruction is that the defendant be given adequate notice of his jeopardy under the included offense. See *Paterno* v. *Lyons,* 334 U.S. 314. Such notice is ordinarily guaranteed through the requirement that all the elements of the included offense be included within the charge.

On the other hand, a defendant may request an included offense charge where the prosecutor does not. This, indeed, is the more usual situation. The defendant may believe that the jury will entertain doubts about the existence of some elements of the charge, but may fear that those doubts will be resolved against him if the only alternative before the jury is outright acquittal. An included offense may exist which does not require the doubtful elements and which carries a lower maximum penalty than the charged offense. In such circumstances, it may be to the defendant's advantage to have a charge on the included offense before the jury.

Such an instruction thus invites the jury, if the state of the proof justifies them in doing so, to acquit the defendant upon the charged offense but to convict him of another offense requiring less proof. For this reason, the rule applies only where the charged offense requires the jury to find a disputed factual element which is not required for conviction of the

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adultery may be convicted of fornication where the evidence showed that he was unmarried. *Respublica* v. *Roberts*, 2 Dall. 124 (Pa.). An indictment for burglary supports a conviction for larceny where the jury is not satisfied as to the breaking and entering in the nighttime. *United States* v. *Dixon*, 25 Fed. Cas. No. 14,968 (C.A.D.C.).

included offense. Unless there is such a factual issue before the jury there will be no rational way for them to convict of one offense while acquitting of the other, and it would not be proper to invite them to do so. As a recent law review comment points out in summarizing the circumstances in which an included offense instruction is proper, "the evidence in the case must meet two requirements in order for an instruction on the lesser crime to be proper. It must be sufficient to support a conviction of the lesser offense and must, at the same time, be such that a finding of not guilty on the greater offense is justified. This is virtually a unanimous requirement: * * * It simply means that the state of the evidence in the case must not be such that the accused can *only* be guilty of the crime charged or not guilty at all. The courts fear that to instruct on lesser offenses will, unless there is independent evidence thereon, lead to improper speculation by the jury—will invest it with a power to commute the punishment rather than restricting itself to a determination of the facts. The application of this test in a number of common situations will mean that instructions on possible lesser offenses are precluded." [13]

The rule that an included offense instruction is proper only when there is a factual basis, in light of the evidence, upon which the jury can properly convict of the included offense while acquitting of the charged offense has also been clearly articulated by

[13] Comment, 57 Northwestern U. L. Rev. 62, 65–66 (1962). Footnotes citing numerous State and federal authorities for the propositions stated are omitted.

this Court. In *Sparf and Hansen* v. *United States*, 156 U.S. 51, 63–64, a murder prosecution where the defendant requested and was denied a manslaughter instruction under the statutory predecessor of Rule 31(c), the Court said:

> The refusal to grant the defendants' requests for instructions, taken in connection with so much of the charge as referred to the crime of manslaughter, and the observations of the court when the jury through their foreman applied for further instructions, present the question whether the court transcended its authority when saying, as in effect it did, that in view of the evidence the only verdict the jury could under the law properly render would be either one of guilty of the offence charged or one of not guilty of the offence charged; that if a felonious homicide had been committed by either of the defendants, *of which the jury were the judges from the proof*, there was nothing in this case to reduce it below the grade of murder; and that, "as one of the tribunals of the country, a jury is expected to be governed by law, *and the law it should receive from the court.*"
>
> The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offence than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be

> guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offence necessarily included in the one charged, or of the offence of attempting to commit the one charged. Upon a careful scrutiny of the evidence, we cannot find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offence included in the one charged, or of a mere attempt to commit the offence charged. A verdict of guilty of an offence less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offence actually committed, and thus impose a punishment different from that prescribed by law. [Emphasis in original.]

Closer to the factual setting of the present case is *Berra* v. *United States*, 351 U.S. 131, summarized *supra*, pp. 10–12. There, as here, the Court found that there was no way in which the jury could have found the facts sufficient to constitute guilt under the allegedly included misdemeanor without also finding the facts constituting guilt under the charged felony. The Court said (at 134–135):

> Petitioner contends that he was nevertheless entitled to the requested instruction. He argues that since there was no difference in the proof required to establish violations of §§ 145(b)

and 3616(a) [of the Internal Revenue Code of 1939], the indictment must be taken as charging violations of both sections, and the jury under Rule 31(c) should have been permitted to make the choice between the two crimes. We do not agree.

The role of the jury in a federal criminal case is to decide only the issues of fact, taking the law as given by the court." *Sparf* v. *United States*, 156 U.S. 51, 102. Certainly Rule 31(c) was never intended to change this traditional function of the jury. Here, whether § 145(b) or § 3616(a) be deemed to govern, the factual issues to be submitted to the jury were the same; the instruction requested by petitioner would not have added any other such issue for the jury's determination. When the jury resolved those issues against petitioner, its function was exhausted, since there is here no statutory provision giving to the jury the right to determine the punishment to be imposed after the determination of guilt. Whatever other questions might have been raised as to the validity of petitioner's conviction and sentence, because of the assumed overlapping of §§ 145 (b) and 3616(a), were questions of law for the court. No such questions are presented here. [Footnotes omitted.] [14]

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[14] See also Mr. Justice Frankfurter's dissenting opinion in *Green* v. *United States*, 355 U.S. 184, 214–215:

"By instructing on second degree murder when the evidence did not warrant a finding of such an offense, the court gave the jury an opportunity for compromise and lenity that should not have been available. * * * the judge's erroneous instruction permitted the jury, for its own undisclosed reason, to render an irrational verdict."

The application of this rule to the present case needs no further demonstration. Since there was no rational way in which the jury in this case could have acquitted petitioner of the Section 7201 charge while convicting him of violating either Section 7207 or Section 7203, those misdemeanors were not offenses which could properly have been submitted to the jury. To have done so would have been to ask the jury not to find facts, but improperly to exercise discretion over the penalty to be imposed.[15] Petitioner's requested instructions were therefore properly refused, even without reference to the policy of the 1954 Code to treat tax evasions exclusively under the Section 7201 felony provision.[16]

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[15] Indeed, an examination of the requested charges shows that they made no attempt to point to any factual issue whatever separating the misdemeanor offenses from the charged felony in light of the evidence before the jury. In this Court, petitioner seeks to discover such a factual issue by contending that he would be guilty of a misdemeanor, but innocent of the felony of evasion, had the jury found that, while he intended his fraud and his underpayment, he also intended to pay in a future year. As we point out, *supra*, pp. 23–24, petitioner is wrong to suppose that his intention to pay in a future year would exculpate him from the felony In any event, since petitioner repudiated this theory of his conduct at trial, he naturally did not request that the jury be instructed with reference to it.

[16] In the body of the brief we argue the case upon the supposition that the question whether one offense is included within another is to be decided by reference to the charge in the particular case. This is the view of the majority of jurisdictions. See Comment, 57 Northwestern U. L. Rev. 62 and cases cited therein. In this majority view, if all of the elements of the lesser offense are included within the charge actually made, the offense is an included offense. Nevertheless, as we show, an instruction is not automatically proper. The additional re-

In their dissenting opinion in *Berra*, 351 U.S. 131, 135, Mr. Justice Black and Mr. Justice Douglas suggest two reasons for disagreeing with the Court's decision in that case. *First*, they suggest that, as a matter of statutory inference, where precisely the same acts constitute both a misdemeanor and a felony, there should be no discretion in the prosecution to proceed upon the more serious felony charge for "[c]riminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly." *Id.* at 138. *Secondly*, they suggest that constitutional doubts would be raised by placing discretion as to penalty in a federal prosecutor rather than in the judge or

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quirement must be met that the jury be able rationally to acquit the defendant of the charged offense while convicting him of the included offense—otherwise the charge would call upon the jury to perform a sentencing function not properly theirs. As we seek to demonstrate, that additional requirement was not met in this case because the jury here could not have rationally convicted under either Section 7203 or Section 7207 without also finding the facts necessary to convict under Section 7201.

There is, however, a narrower view of included offenses than the one upon which the body of the brief is written. Under this view, an offense is not included within the charged offense unless all of its statutory elements are necessarily included within the *statutory definition* of the charged offense. See *State* v. *Woolman*, 84 Utah 23; *State* v. *Rohletter*, 108 Utah 432; *State* v. *Waid*, 92 Utah 297; *State* v. *Clayton*, 236 La. 1093; *State* v. *Poe*, 214 La. 606; *State* v. *Roberts*, 213 La. 559. Under this view, the Section 7203 and Section 7207 misdemeanors could not possibly have been deemed offenses included in the Section 7201 charge, for it is evident that the offense under Section 7201, as statutorily defined, may be committed in many ways which do not simultaneously involve violations of either misdemeanor. Thus the question whether the jury could rationally convict of one offense while acquitting of the other would not even be reached.

jury. These views did not of course command a majority of the Court in *Berra*, but we submit that, even if they had, they would not control the result here.

In *Berra*, the allegedly included misdemeanor contained all the elements of the felony, with the additional requirement that the evasion be committed through a fraudulent statement. In that circumstance, where the misdemeanor demanded at least as much proof as the felony, it was possible to argue, through the application of a rule of lenity, that Congress intended the misdemeanor, rather than the felony, to apply where the misdemeanor was applicable. No such argument is plausible under the 1954 Code, where the misdemeanors are drawn so as to require substantially less proof than the Section 7201 felony. As shown in Point I of this brief, *supra*, Congress made clear its desire to treat "what in substance is the same offense, namely the attempt to evade tax" uniformly under the felony provisions of Section 7201. H. Rep. *supra*, p. 108; S. Rep., *supra*, p. 147. It would wholly distort this desire to require the government to proceed by way of misdemeanor whenever the elements of a misdemeanor were present even though the felony of evasion had also been committed. The result of such a holding would be virtually to eliminate the application of the felony statute—the direct contrary of what Congress intended.

Nor is there reason, in this case, to be concerned with possible constitutional objections which might be inherent in a scheme giving a federal prosecutor discretion as to the penalty to be imposed upon particular defendants. Such objections are not relevant here because, under the 1954 Code, a prosecutor has no unbridled discretion. As both the House and Senate Reports emphasize, minimum penalties are omitted in the Code for the offenses relating to this case so that it would be "possible for the judges to better fix the penalties to fit the circumstances." H. Rep., *supra*, p. 108. Thus, the trial judge, not the prosecutor, has complete discretion as to penalty under the 1954 Code.

In sum, whether one considers the policy of Congress to treat acts of tax evasion exclusively as felonies when the elements of the felony are charged and necessarily proved, or whether one has reference to the traditional rule relating to instructions upon included offenses, the proof in this case required that the jury ascertain petitioner's guilt solely with reference to Section 7201 of the 1954 Code. The requested instructions, which would have called upon the jury to act without reference to the proof before them, were properly denied.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 365.

MICHAEL C. SANSONE,
Petitioner,

vs.

UNITED STATES.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR THE PETITIONER.

ARGUMENT.

I. While Section 7201 may be the only statute defining punishment for a defendant who has been found by a jury to be guilty of tax evasion, this does not preclude the possibility that lesser offenses under the Internal Revenue Code might be involved in a tax evasion charge, so that under appropriate evidence and Rule 31 (c) a jury should be given the alternative of finding defendant guilty of a lesser offense not amounting to a tax evasion.

Much of the government's brief, and indeed all of Point I of its argument, is devoted to the proposition that Section 7201 is the only statute dealing with income tax eva-

sion, and is the only statute under which such a crime may be punished. Petitioner has no quarrel with this, insofar as it refers to an offense which the jury has found to constitute tax evasion (i. e., a willful attempt to defeat or evade taxes) and where the jury has by its verdict rejected any lesser included tax offense. But somehow or other, the government rationalizes that this precludes any lesser offense instructions in an income tax evasion trial, and that (for some undisclosed reason) Section 7201 should be immune from the provisions of Rule 31 (c):

> "To repeat, however, if the charge and proof, if true, necessarily show a felonious evasion of tax under Section 7201, that section alone defines the offense and the penalties."
>
> (Brief for the United States, p. 19.)

The government overlooks the fact that even though the charge and proof may show a *prima facie* tax evasion offense, the jury might disbelieve some of that proof and might not be convinced beyond a reasonable doubt as to some required element of the tax evasion offense; in such instance, the jury should be able to find defendant guilty, under Rule 31 (c), of one of the lesser crimes (not requiring the questioned element), included in the tax evasion charge—crimes which violate the Internal Revenue Code but do not amount to tax evasion. Thus even though the government may indict for tax evasion, and may make *prima facie* proof of tax evasion, where there is conflicting evidence as to certain elements the jury should not be limited to the two possibilities of either convicting of tax evasion or acquitting. The fact that there is but one tax evasion statute is immaterial; what is important is that the Code defines other offenses, necessarily included in the tax evasion charge, under which the jury might convict if it found an absence of some element essential to a tax evasion conviction. This is precisely the situation which Rule 31 (c) was intended to cover, and no reason whatso-

ever has been suggested or demonstrated by the government as to why this rule should not be pertinent in an income tax evasion case. Offenses under the Internal Revenue Code certainly are no different from other federal crimes insofar as the applicability of the Federal Rules of Criminal Procedure is concerned.

In short, petitioner is not contending that the jury should have had the option of convicting under a misdemeanor statute for the felony of tax evasion. Petitioner simply submits that lesser offenses, not amounting to tax evasion, are included in the instant charge, and that under the evidence the jury might have concluded that one of these lesser offenses, rather than the tax evasion felony, was committed. Therefore, instructions as to the lesser offenses were required.

II. The specific intent required under Section 7201 is different and greater than that required for misdemeanors under Sections 7203 and 7207; since the evidence here showed conflicts as to the nature and degree of defendant's intent, adequate justification existed for lesser offense instructions.

In arguing that the evidence did not justify any lesser offense instructions, the government contends that "the existence of a tax deficiency" is the aggravating element distinguishing a 7201 felony from a 7207 misdemeanor (Brief for the United States, p. 20). Similarly, it argues that an affirmative act, as distinguished from a mere omission, is the aggravating element distinguishing the felony from a 7203 misdemeanor. On the other hand, the government submits, the element of "willfulness" is required in all three crimes and hence is not an aggravating or distinguishing element; in other words, if the jury found "willfulness", it should convict of the felony; but if it found no "willfulness," it must acquit altogether (Brief for the United States, p. 22). This argument erroneously

assumes that the element of "willfulness" means the same thing in each of the three offenses, an assumption which has been specifically rejected by this Court and by the language of the statutes themselves.

In **Spies v. United States**, 317 U. S. 492, 497, it was clearly recognized that the term "willful" can mean many different things, depending upon the context in which it is used. Thus, it was illustrated, it might mean merely "voluntary and purposeful" as distinguished from accidental, when used in the misdemeanor statutes. But as used in the felony statute, Section 145 (b) (now Section 7201), the **Spies** opinion points out that the willfulness must pertain to a **tax evasion attempt**; this was further enunciated in **Holland v. United States**, 348 U. S. 121, 139, where it was noted that willfulness as used in the felony statute involves a "specific intent," i. e., an intent to commit the crime charged. The language of the code admits of no other construction; all three sections use the term "willfully," yet in each section that term refers to a different act. In Section 7201, it pertains to the attempt to defeat or evade taxes; in Section 7203, it refers to the failure to pay a tax or file a return; and in Section 7207 it clearly refers to the delivery of a return known to be false. Thus only in regard to Section 7201 does the "willfulness" element involve an intent to defeat or evade taxes; in the misdemeanor statutes it means something less, perhaps, as suggested in **Spies**, merely that the act or omission was intentional and voluntary.

Therefore, the element of willfulness or intent is a distinguishing feature between the felony and the misdemeanor. Only when such willfulness involves an intent to defeat or evade taxes can the felony be found; if the taxpayer's intent is anything less than that, he can be convicted only of a misdemeanor.

The evidence below clearly demonstrates a conflict on the issue of intent, best illustrated by the very written

admission which the government used to prove intent (R. 77). One sentence in that admission expressly repudiates any intent to evade:

> "It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so."

The Solicitor argues that, since petitioner's own trial testimony repudiated the entire admission, he cannot rely on that admission as justifying a lesser offense instruction (Brief for the United States, p. 22). The appellate decisions cited by the Solicitor do not support this contention; they merely hold that where there is no contested issue as to the distinguishing element (that element which raises a misdemeanor to a felony), a lesser offense instruction as to the misdemeanor is not authorized. But none of these cases prohibits the use of government evidence, which a defendant has repudiated, as grounds for the lesser instruction. In fact, one of these decisions, **Cuillo v. United States**, 325 F. 2d 227, 228, specifically rejects the argument now advanced by the Solicitor:

> "The Government in its brief appears to accept the principle that, in order to obviate the need for the requested (lesser offense) instruction, the defense testimony must 'affirmatively' establish the distinguishing elements, i. e., obtaining and reliance. We take 'affirmatively' in this context to mean that the evidence in question admits of no rational inferences other than those establishing the existence of the two elements involved. To apply a lesser standard would be to trench upon the jury's function, and to deprive appellant of his right to have the jury reach its own conclusions from evidence which is susceptible of varying interpretation."

Here the written admission of petitioner, introduced into evidence and read to the jury (R. 75), even though re-

pudiated by petitioner, injected a clear question as to the element of willfulness, particularly as to whether it included an intent by petitioner to defeat and evade his taxes. If the jury were to believe the admission in its entirety, it must necessarily conclude that Sansone intentionally understated his 1957 income so that he would not pay the tax immediately, but did not intend to evade the tax and fully intended "to pay any additional taxes due" when he was "financially able to do so." This would be a 7203 violation and nothing more, absent the critical element of tax-evasion intent.

Even without the written admission, the evidence requires at the very least an instruction under Section 7207. (Apparently the Government has abandoned the argument, advanced by the Eighth Circuit, that this section does not apply to income tax returns.) Petitioner, in his trial testimony, admitted receiving the proceeds from the 1957 sale (R. 135), and admitted that he intentionally did not report that sale in his 1957 return (R. 135). His justification was that he anticipated further costs on the land, which he thought he was entitled to recover before reporting any capital gain (R. 135). Under this testimony, a jury could reasonably conclude that even if he honestly anticipated further costs and their determination as necessary before reporting any gain or profit, he should have reported the fact of the sale on his 1957 return because the return calls for the reporting of all sales and exchanges during the taxable year, thus he was guilty of willfully (i. e., intentionally and not accidentally) filing a return which he knew to be false. This would be on the theory that even an honestly held belief that no gain is yet reportable on a particular transaction does not relieve a taxpayer from giving his government the information called for as to the fact of a transaction. A taxpayer, for instance, may not willfully omit from his return the fact of a condemnation or sale of his personal residence, even though by proper election he could avoid

reporting gain thereon until some future year. On the other hand, a jury could just as reasonably choose to disbelieve that he honestly held any belief that his anticipated costs should have been ascertained before he was obliged to show any capital gain and find him guilty of an intent to defeat and evade his 1957 taxes. Hence a genuine factual issue, revolving around taxpayer's intent, is raised by his testimony: did it show a taxpayer merely intentionally and not accidentally filing a 1957 return which he knew to be false as to content and information, yet fail to convince beyond a reasonable doubt that his willful misconduct did not stop there, but went on to encompass an intent to defeat or evade the tax? Such an issue required a lesser offense instruction under Section 7207. Furthermore since this instruction is justified by the trial testimony alone, it does not depend upon the acceptance or rejection of all or part of the written admission. Thus petitioner submitted two separate lesser offense instructions to the trial court: one, defining the misdemeanor under Section 7203, was justified by the statements in the written admission of the taxpayer; the second, defining a Section 7207 misdemeanor, was fully supported by his trial testimony and was required irrespective of the written admission, although the admission (even if taken alone), also independently delineated a Section 7207 offense.

The government takes the position that the fact, even if believed, that petitioner intended to correct his 1957 return at some future time and intended to report his 1957 income in some future year would not entitle him to a lesser offense instruction under Section 7203; the thrust of this argument is that as soon as he dropped his false 1957 return in the mail, he then and there completed the crime of attempting to evade or defeat the assessment of his 1957 income tax. The fallacy of this argument is that it assumes that a willful attempt to postpone or delay the assessment of one's 1957 income tax is the same as an attempt to defeat or evade the assessment of one's 1957

income tax; in short, it equates the statutory language "to evade or defeat" with "to postpone or delay." **Evade** and **defeat** mean to deprive and cheat on a permanent basis; these words imply a far different meaning than merely to delay in point of time the performing of some obligation. In both cases, criminality applies, but the jury would determine whether the taxpayer's attempt was merely to postpone (willful non-payment, a misdemeanor) or to permanently deprive the government of its revenue (a felony), whether it be by way of defeating assessment or defeating payment. This distinction has been recognized by this Court under analogous circumstances in **Keegan v. United States**, 325 U. S. 478, where counselling the refusal to serve in the armed forces of the United States until some future time was not held to be counselling an "evasion" of one's military obligation. The weakness of the government's position is that not every false return need be filed with the intent to defeat or evade the assessment, the tax, or the payment involved; it may be filed with the unlawful intention (though the lesser offense of a misdemeanor) to make an unauthorized borrowing of the government's tax monies and later to self-assess correctly and to make payment in full. Whether or not such a professed intent is credible under any record is a jury question. Furthermore, the government, it seems, has recognized such a distinction in bringing past indictments. In **United States v. Seymour** (D. Mass. April 11, 1955, unreported), the taxpayer correctly stated in his return all income and expense items, but willfully overstated the payments and credits on his declaration of estimated tax. His intent was to defer payment of the tax until pressed. Under the government's theory, he would have been guilty of an attempt to defeat and evade his tax when he mailed the return because his return was patently false and the amount shown as due was willfully rendered incorrect. Yet he was charged and convicted only a willful failure to pay his tax under Section 7203. The cases cited by the govern-

ment for the proposition that the crime of tax evasion is complete as soon as the false and fraudulent return is filed (Brief for the United States, p. 24) all carry the additional *caveat* "with intent to defeat or evade any part of the tax due the United States," see **Cave v. United States**, 159 F. 2d 464, 467, cited at p. 24 of Brief for the United States. Petitioner suggests that it is more accurate to say that **some** crime is complete as soon as the false and fraudulent return is filed, but whether it is the felony of tax evasion or some lesser offense depends on whether the intent was to defeat and evade or merely to postpone and delay, as finally determined by the jury.

Petitioner suggests that the gradation between offenses set forth here on the basis of the accused's intent is typical of the gradation found in lesser included offenses in other areas of the criminal law. If anything, the teaching of **Spies**, supra, is that tax crimes are not *sui generis* and are not to be divorced from settled doctrines of criminal jurisprudence. In larceny, for instance, once given the element of asportation, the question for the jury is whether the defendant intended to deprive the true owner permanently thereof or to return it to him. This is perfectly illustrated in those cases where the defense to the felony of larceny of a motor vehicle is that the defendant was only out for a joy-ride, an unauthorized borrowing, and intended to return the auto to its true owner, thus making the offense the misdemeanor of unauthorized possession of a motor vehicle. There are numerous other instances where the jury's fact-finding as to a defendant's intent makes him guilty either of the greater or lesser offense. The basis for gradation here is not new and depends just as much on the jury's common sense appraisal of the evidence before it as the difference in intent between murder and manslaughter, assault with intent to kill and common assault, larceny of a motor vehicle and unauthorized possession of a motor vehicle (to name a few).

CONCLUSION.

It is submitted that record below clearly justifies the requested lesser offense instructions, and that the government's attempt to exempt Section 7201 from the application of Rule 31 (c) is without authority or justification in logic, precedent, or legislative history.

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